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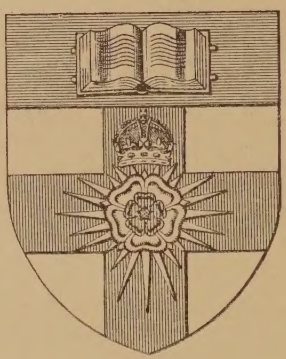

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December, 1868.

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Court of Queen's Bench.

REPORTED BY

WILLIAM MILLS AND HENRY HOLROYD,
BARRISTERS-AT-LAW.

AND

In the Bail Court,

BY

E. A. C. SCHALCH,
BARRISTER-AT-LAW.

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CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXI VICTORIA.

THE OVERSEERS OF ST. GEORGE, HANOVER SQUARE, APPELLANTS; THE GUARDIANS OF THE CAMBRIDGE UNION, RESPONDENTS.

1867
Nov. 9.

Poor—Settlement by paying public taxes of parish, under 3 *W. & M., c.* 11, *s.* 6 *—Landlord's property tax—*5 *& 6 Vict. c.* 35, *ss.* 60, 73, *Sch.* (*A*).

A tenant of premises, who has been assessed and paid the property tax under Sch. (A), and deducted it from the next rent paid to the landlord, acquires a settlement in the parish in which the premises are situate, under 3 W. & M., c. 11, s. 6. So held on the authority of cases decided under the land tax acts.

CASE stated under 12 & 13 Vict. c. 45, s. 11, upon an appeal against an order for the removal of three infant children of James Legge (who had deserted them, and whose place of abode was unknown), being chargeable to the common fund of the respondent union, to the appellant parish as their place of settlement.

James Legge, the father of the paupers, rented a tenement, consisting of a separate and distinct dwelling-house, being No. 11, Hanover Street, Pimlico, in the appellant parish, for one year, viz., from Michaelmas, 1863, to Michaelmas, 1864, at the rent of 42*l.*,

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ST. GEORGE, HANOVER SQUARE, v. CAMBRIDGE UNION.

subject to the tenancy being determined at a quarter's notice. James Legge entered into the occupation of the tenement and occupied the same under the said renting, and resided and inhabited therein during the whole of such period of one year. The rent of 42*l.* was duly paid by James Legge to the landlord.

The rates for the relief of the poor of the appellant parish were and are made annually, viz., from Lady Day of one year to Lady Day of the following year. At Lady Day, 1864, the name of James Legge, the tenant, appears in the poor rate book of the appellant parish, and James Legge was duly assessed and rated therein in respect of the tenement, but no portion of such rate was paid by him.

In the assessment for the year ending the 5th of April, 1865, made under and by virtue of the acts of parliament for the assessment of occupiers of property to the property and income tax, the name of James Legge, the tenant, appears, and, upon the 8th of June, 1864, James Legge paid to the collector of taxes appointed to receive the same the sum of 1*l.* 3*s.* 4*d.*, being four quarters' duty or income tax for the year ending the 5th of April, 1864, which became due on the 20th of March, 1864, under schedule (A), for and in respect of the tenement before mentioned; and which sum of 1*l.* 3*s.* 4*d.* was subsequently allowed and paid by the landlord of the premises to James Legge by deduction from the said rent of 42*l.*

If the Court of Queen's Bench was of opinion, upon the facts above stated, that James Legge gained a legal settlement in the appellant parish under the 3 W. & M. c. 11, s. 6 (1), by virtue or in consequence of the payment of the sum of 1*l.* 3*s.* 4*d.*, the order of justices was to be confirmed. If otherwise, such order was to be quashed.

Mayd (*O'Malley, Q.C.*, with him), for the respondents. The tenant, by payment of property tax under schedule (A) (5 & 6 Vict. c. 35),

(1) Which enacts that, "if any person, who shall come to inhabit in any town or parish, shall for himself and on his own account execute any public annual office or charge in the said town or parish, during one whole year, or shall be charged with and pay his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereinbefore required."

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though he be repaid by deduction from the next rent, acquires a settlement, under 3 W. & M. c. 11, s. 6. By s. 60 of 5 & 6 Vict. c. 35, the occupier is assessed, and he is liable primâ facie as owner, and it is only by virtue of schedule (A), No. iv., rule ninth, that he can recoup himself by deduction from the first payment of rent. The analogy between this tax and the land tax is complete, and it has been decided over and over again that the payment of the land tax confers a settlement: *Rex* v. *Bramley* (1), recognized in *Rex* v. *Christchurch* (2); and it is immaterial that the tenant has been reimbursed: *Rex* v. *Chidingford* (3). No doubt the property tax is not strictly a parochial tax, though by s. 60, schedule (A), No. iv., rule first, all properties must be charged in the parish where they are situate; but the same objection is applicable to the land tax, and in *Rex* v. *Bramley* (4) Lord Hardwicke says: "The great doubt has been whether the legislature did not mean parochial taxes. But this has been long gotten over; and the land tax has been holden to be within the act, from the notice of inhabitancy that arises by the parties being assessed and paying it." And this ground of notice runs through all the cases as to settlement by payment of rates: *Rex* v. *Walsall.* (5)

The Court then called upon

Keane, Q.C. (*F. T. Streeten* with him), for the appellants. The property tax is neither a parochial tax nor collected by parish officers. It is also a fallacy to say the tenant is assessed, or that he ever actually pays; he simply advances the money for the landlord out of rent accruing due; and by s. 73, the landlord must repay it, notwithstanding any agreement to the contrary.

[LUSH, J. By ss. 60 and 73 the duties are to be charged and paid by the occupier, subject to this deduction. If the tenant neglect to deduct he must pay.

COCKBURN, C.J. The point, as originally decided, may be very doubtful: but the decisions upon the land tax have been uniform down to *Rex* v. *Axmouth.* (6)]

In that case *Rex* v. *Oakehampton* (7) is treated as the original

(1) Bur. Set. Ca. 75.
(2) 8 B. & C. 660.
(3) Bur. Set. Ca. 415.
(4) Bur. Set. Ca. at p. 76.
(5) Cald. 35.
(6) 8 East, 383.
(7) Bur. Set. Ca. 5.

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authority; and the ground of the decision in the latter case is clearly the notice of inhabitancy. But where is the notice of inhabitancy, when the property tax is neither a parochial tax nor made nor collected by parish officers?

[COCKBURN, C.J. The property must be assessed, and the rate collected in the parish where the property is situate.]

But not by parish officers. By s. 36, the assessors and collectors are to be appointed by the commissioners who act for large districts. (1)

COCKBURN, C.J. I am of opinion that a settlement was gained by this payment of property tax; I can see no substantial difference in principle on this point between the land tax and property tax; and this Court, in *Rex* v. *Bramley* (2), decided that the payment of land tax by the tenant gained a settlement. It may be that this Court might well have come to a contrary conclusion, and that the conclusion it came to was scarcely based on sufficient grounds; but the Court did so hold; and that case was acted on in *Rex* v. *Axmouth* (3), and acknowledged to be law in *Rex* v. *Christchurch* (4), though it was distinguished from the case then before the Court, on the ground as pointed out by

(1) The first land tax act in the modern form was 4 W. & M., c. 1, which was continued annually till 1797, when 38 G. 3, c. 5, the land tax act made perpetual by c. 60, was passed. Most of the cases were decided under the first act, which by s. 5 enacts, that warrants are to be issued by the commissioners to two at least of the most able and sufficient inhabitants of each parish, township, or place, within the divisions, appointing and requiring them to be assessors of the duties imposed by the statute, and the assessors are to assess all the rateable property in their respective charges, and return certificates at the time prefixed, and also to return the names of two or more able and sufficient persons living within the bounds of the parishes, townships, &c., to be collectors of the moneys to be paid under the act, for which such parish or place shall be liable. This section is re-enacted with some modifications by s. 8 of 38 G. 3, c. 5.

By the Property Tax Act 5 & 6 Vict. c. 35 (s. 3) the tax is to be assessed and collected, and (s. 36) the assessors and collectors to be appointed, as under 43 G. 3, c. 99 (the assessed tax act) and s. 9 of the last act, as to the appointment of assessors and collectors, is in very much the same terms, mutatis mutandis, as the corresponding sections of the land tax acts. So that both by the Land Tax Acts and the Property Tax Act assessors and collectors are appointed from the inhabitants in each parish.

(2) Bur. Set. Ca. 75.

(3) 8 East, 383.

(4) 8 B. & C. 660.

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Bayley, J., that "the land tax was holden to be within the act from the notice of inhabitancy that arises by the party's having been assessed and paid it." Therefore, whether the original case was well decided or not, it would be acting contrary to the principle on which this Court acts, were we to disturb what has long been settled law, by reviewing that case. The present tax is in all points within the principle of that case; for the land tax was neither assessed nor collected by officers appointed by the parish, so that the analogy between the two cases is complete. We must, therefore, abide by the old decisions, and decide that a settlement has been gained by the paupers' father in the appellant parish.

MELLOR and LUSH, JJ., concurred.

Order affirmed.

Attorneys for appellants: *Capron, Brabant, Capron, & Dalton.*
Attorneys for respondents: *Doyle & Edwards, for J. D. Fetch, Cambridge.*

WAITE, APPELLANT; THE LOCAL BOARD OF HEALTH OF GARSTON, RESPONDENTS.

Nov. 9.

Local Board of Health—Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 34 *—Validity of Bye-law as to Privies and Ashpits.*

Section 34 of the Local Government Act, 1858, enables a local board of health to make bye-laws "with respect to the drainage of buildings, to waterclosets, privies, ashpits, and cesspools, in connection with buildings":—

Held, that the section did not empower the making of a bye-law, that "no dwelling house shall be erected without having, at the rear or side thereof, a good and sufficient back street or roadway, at least twelve feet wide, communicating with some adjoining public street or highway, for the purpose of affording access to the privy or ashpit of such house."

CASE stated under 20 & 21 Vict. c. 43, by justices of Lancashire.

The appellant was convicted, on the complaint of the local board of health for the district of Garston, of a breach of a bye-law, made by that board under the powers of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Act, 1858 (21 & 22 Vict. c. 98).

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The bye-law is No. 1 of the additional bye-laws passed on the 5th of December, 1865, and is as follows:—

"No dwelling house shall be hereafter erected without having, at the rear or side thereof, a good and sufficient back street or roadway at least 12 feet wide, communicating with some adjoining public street or highway, in such situation as shall be approved by the local board, for the purpose of affording efficient means of access to the privy or ashpit belonging to such house; and every plan which shall be left at the office of the local board, in pursuance of the 64th bye-law, shall shew the position, width, and direction of such roadway as intended to be made, and its mode of communication with adjoining streets or highways. Provided always that it shall be lawful for the local board, at their discretion, in special cases, to modify the requirement hereinbefore contained, and to dispense with strict compliance with the terms of this bye-law, on such conditions as they may deem fit and reasonable."

The appellant was summoned for having, after the making and passing of the said bye-law, erected a dwelling house, without leaving at the rear or side thereof a good and sufficient back street, or roadway, at least 12 feet wide, communicating with some adjoining public street or highway, in a situation approved by the local board, for the purpose of affording efficient means of access to the privy or ashpit belonging to such house.

The facts were not disputed, it being admitted on the part of the appellant that he had erected the house as alleged, without any back street or roadway, except a passage 4 feet in width; and that the plan submitted by him previous to the erection of the house, and after the passing and confirmation of the bye-law, had been disapproved on that account by the local board: but it was contended on his behalf that the bye-law was invalid and illegal, by reason of its not having been made with respect to any of the matters mentioned in s. 34 of the Local Government Act, 1858 (1), but for another purpose, not authorized by that act, or the Public

(1) 21 & 22 Vict. c. 98, s. 34, after repealing ss. 58 and 72 of 11 & 12 Vict. c. 63, enacts in lieu thereof, "Every local board may make bye-laws with respect to the following matters: (4) With respect to the drainage of buildings, to watercloseets, privies, ashpits, and cesspools in connection with buildings," &c.

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Health Act, 1848. And also that the local board have not under these acts, or either of them, the power to require any passage or back street to be made or left at the rear of any house or other building, or to require any alteration to be made in the width of any such passage or back street, if the owner of such house or other building propose to make or leave such.

[The appellant also contended that, if the bye-law were legal and valid, he was exempted from compliance with the requirements under the special circumstances; but the decision of the Court renders it unnecessary to set out the facts.]

The question for the Court was—Whether the appellant was or was not bound to comply with the requirements of the bye-law? If the Court were of opinion in the affirmative, the conviction was to be affirmed; if in the negative, to be reversed.

J. A. Russell, for the respondents, contended that the bye-law was valid, and authorized by the powers conferred by s. 34, paragraph (4) of 21 & 22 Vict. c. 98. The proviso at the end of the bye-law would prevent it operating harshly.

The appellant did not appear.

The Court (COCKBURN, C.J., and LUSH, J.) were clearly of opinion that the bye-law was in excess of the powers conferred by the statute, and therefore invalid. The bye-law extended much further than in respect to privies and ashpits, and it would amount to preventing the building of houses at all in certain cases. The proviso at the end, as it is left entirely in the discretion of the board to enforce the bye-law or not, could not make valid a bye-law otherwise invalid.

Judgment for the appellant.

Attorneys for appellant: *Wright & Venn, for Atkinson, Bartlett, & Atkinson, Liverpool.*

Attorneys for respondents: *Eyre & Lawson, for Lloyd, Garnett, & Lloyd, Liverpool.*

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Nov. 9.

DEAL, APPELLANT; SCHOFIELD, RESPONDENT.

Beer Act (3 & 4 Vict. c. 61), s. 13—"*Selling Beer to be Consumed on the Premises.*"

The defendant was a person licensed to sell beer not to be drunk on the premises; his servant handed beer in a mug of the defendant's, through an open window of the defendant's premises, to a person who, after paying for it, drank it immediately, standing on the highway as close as possible to the window:—

Held, that this evidence did not justify a conviction of the defendant under 3 & 4 Vict. c. 61, s. 13, for "selling beer to be consumed on the premises where sold."

CASE stated under 20 & 21 Vict. c. 43, by justices of Suffolk.

An information under 3 & 4 Vict. c. 61, s. 13 (1), was preferred by the respondent, a superintendent of police, against the appellant, a licensed seller of beer by retail, not to be drunk on the premises where sold, for having on the 10th of April, 1867, at Assington, unlawfully sold beer, to wit, one pint of beer to be consumed in or upon the house or premises where sold, without being duly licensed so to do.

The facts deposed to were as follows:—

About eight o'clock on the night named, police-constable Barnard was on duty in Assington parish, in plain clothes, and went to the co-operative stores kept by the appellant, who also sells beer on the same premises "not to be drunk on the premises." The police-constable went to the window (which was shut) on the right-hand side of the door, and tapped at it; the man in charge of the stores opened the window, and the police-constable asked him for a pint of beer, which he brought, and for which the police-constable paid him one penny halfpenny. The storekeeper gave

(1) 3 & 4 Vict. c. 61, s. 13:—"If any person, not being duly licensed to sell beer or cider, shall retail any beer or cider, either to be consumed in or upon the house or premises, or off the premises where sold, or if any person shall sell any beer or cider to be consumed in or upon the house or premises where sold, without being duly licensed so to do, such person shall, in addition to any excise penalty to which he may thereby become subject, forfeit five pounds," &c. Section 16 enables justices to mitigate the penalties. By s. 20 all the provisions of 11 Geo. 4 & 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85, are to be deemed applicable to the present act, except so far as they are altered by the present act.

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the beer, in a pint mug, into the policeman's hands, who stood as close to the window as he could, and drank part of it, and afterwards, in the presence of the storekeeper, sat down on the window sill, and drank the remainder of the beer, the window remaining open all the time.

While the policeman was drinking the beer, another man came up, and asked for a pint of beer, which was supplied by the storekeeper through the window, and the policeman saw the man pass something to the storekeeper as if in payment, and the man stood about a yard from the window and drank the beer.

There is no mark or boundary of any kind between the window and the road, the space between being about three yards, but on the other side of the door of adjoining house, and which is occupied by another tenant, a space about two yards wide in front of the window is enclosed from the road.

The storekeeper (a man in the employ of the appellant) told the policeman, in reply, that the appellant was not at home, and that he, the storekeeper, was not aware that he had sold the beer to be consumed on the premises, that he considered he had not done so.

It was admitted that the mug in which the beer was supplied was the appellant's.

On these facts it was contended, on behalf of the appellant, that the beer was sold and the transaction completed, so far as the appellant was concerned, immediately the beer was paid for and handed to the policeman, who was upon the highway and not upon the appellant's premises at the time, and that he, the appellant, was not responsible as to where the beer was drunk, or what was done with it, and referred to s. 4 of 4 & 5 Wm. 4, c. 85, as defining what is a sale upon the premises. (1)

(1) 4 & 5 Wm. 4, c. 85, s. 4:—"If any person licensed to sell beer or cider not to be consumed upon the premises shall, with intent to evade the provisions of this act, take or carry, or authorize, or employ, or permit, or suffer any person to take or carry any beer or cider out of or from the house or premises of such licensed person for the purpose of being sold on his account, or for his benefit or profit drunk or consumed in any other house, or in any tent, shed, or other building of any kind whatever belonging to such licensed person, or hired, used, or occupied by him, such beer or cider shall be deemed and taken to have been drunk or consumed upon the premises, and the person selling the same shall be subject to the like forfeitures and penalties as if such beer or cider had been actually drunk or consumed in any house or upon any premises licensed only for the sale thereof as aforesaid."

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The justices, being of opinion that the sale of beer in the mug of the beerhouse-keeper at the place stated in the evidence, for immediate consumption with the evident sanction of his servant, was an offence under 3 & 4 Vict. c. 61, s. 12, and contrary to the spirit of 4 & 5 Wm. 4. c. 85, s. 4, convicted the appellant in a penalty of 2*s.* 6*d.* and costs.

Melsh'e, for the respondent. The appellant was rightly convicted. It was the intention that the beer should be drunk immediately, and it was, in effect, drunk on the premises. *Cross* v. *Watts* (1) is very much in point.

[COCKBURN, C.J. There, there was a bench for customers placed close by, and belonging, if not licensed, to the defendant's premises. Here, what the policeman did when drinking the beer in order that he might be on the premises, cannot make the appellant liable if he would not otherwise be so. It does not appear that the storekeeper knew that the beer was to be drunk immediately.]

The beer was put into the appellant's mug, not into a mug of the customer. It was clearly a mere evasion of the statute.

[LUSH, J. Section 4 of 4 & 5 Wm. 4. c. 85 (2) shows what the legislature considers an evasion.

COCKBURN, C.J. It may be an evasion; but we cannot say that the fact of a man standing on the highway, though close to the house, and drinking beer, amounts to a consumption on the appellant's premises.]

Hance, for the appellant, was not heard.

PER CURIAM.

Judgment for the appellant.

Attorneys for appellant: *Doyle & Edwards, for Jones, Colchester.*

Attorneys for respondent: *B. W. & V. Poops.*

(1) 31 L. J. (N.S.) 230; 32 L. J. (M.C.) 73.

(2) See ante p. 9, n. (1).

THE QUEEN *v.* PARKINSON.

1867
Nov. 6.

Municipal Corporation—Qualification of Person nominating Candidates for Town Councillor—22 Vict. c. 35, s. 6.

Under s. 6 of 22 Vict. c. 35, where a municipal borough is divided into wards, the person nominating a candidate for town councillor must be entitled to vote for the particular ward for which he nominates, and if he be entitled to vote only for another ward his nomination and the election of the candidate are void.

Quo warranto information, alleging that Beverley was a municipal borough, divided into two wards, the Minster Ward and the Saint Mary Ward: that there were three vacancies at the election on November the 1st, 1866, for town councillors for the Minster Ward, that the defendant was nominated in writing for one of the vacant offices by one William Whiting, and that Whiting was not entitled to vote at the election of councillors for the Minster Ward, in respect of which he assumed to make the nomination, nor was he on the burgess roll of that ward, but he was on the burgess roll of the Saint Mary Ward. That the defendant was not nominated as by the statute is required, and by reason thereof was not duly elected a councillor: yet he took upon himself and exercised the office, &c.

Demurrer and joinder.

Keogh, in support of the demurrer. The information does not shew that the defendant's election was invalid. The question turns upon the construction to be put upon s. 6 of 22 Vict. c. 35, which enacts that "at any election of councillors to be held for any borough or ward, any person entitled to vote may nominate for the office of councillor himself (if duly qualified), or any other person or persons so qualified (not exceeding the number of persons to be elected for the borough or ward), and every such nomination shall be in writing, &c." The nomination of the defendant was good, as the person nominating was entitled to vote for town councillors of the borough, although not entitled to vote in the Minster Ward. The statute does not render it necessary that the person nominating should be a voter for the particular ward, it is sufficient if he be a voter for the borough.

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[LUSH, J. By s. 8, if the number of candidates is not greater than the vacancies, the persons nominated are to be elected without a poll, so that, in effect, the person nominating the candidate votes for him.

COCKBURN, C.J. The section clearly requires that the person nominating should be entitled to vote at the election for which he nominates, whether it be for the whole borough, if not divided into wards, or for a particular ward, when the borough is divided.]

Keane, Q.C., for the relator, was not heard.

PER CURIAM.

Judgment for the Crown. (1)

Attorney for relator: *Hamilton.*

Attorney for defendant: *F. W. Blake, for Bainton, Beverley.*

Nov. 18.

Ex parte HINDMARCH.

Municipal Corporation—Qualification of Town Councillor—"Entitled to be on the Burgess List"—5 & 6 Will. 4, c. 76, s. 28.

Ante 11
Post 131
5 CPD 184

Section 28 of 5 & 6 Will. 4, c. 76, disqualifies any person from being eligible as a town councillor of a borough "who shall not be entitled to be on the burgess list of such borough."

P. was elected in August, 1867, a town councillor; he was then, in fact, on the burgess roll which came into operation on the 1st of November, 1866, but he was not, when put on it, duly qualified to be on the burgess roll. In November, 1867, on a motion for a quo warranto information against P., on the ground that he was disqualified as town councillor, not being "entitled to be on the burgess list," the Court refused a rule.

MOTION on behalf of Edward Smith Hindmarch, for a rule for a quo warranto information calling upon John Potts to shew by what authority he exercised the office of town councillor of the borough of Gateshead, on the ground that, when elected a councillor, he was not entitled to be on the burgess list of the borough.

(1) See the next case.

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Ex parte HINDMARCH.

Gateshead is a municipal borough divided into wards, and Potts was elected after a poll on the 19th of August, 1867, to fill an extraordinary vacancy in the town councillors for the South Ward. Potts was on the burgess roll which was revised in October, 1866, and which came into operation on the 1st of November, 1866; but the affidavits negatived his having, on the 31st of August, 1866 any of the qualifications to be so enrolled as required by ss. 9 & 12 of 5 & 6 Will. 4, c. 76.

J. C. Heath, in support of the motion. The 28th section of 5 & 6 Will. 4, c. 76 (1), disqualifies for the office of town councillor of any borough, inter alios, any person "who shall not be entitled to be on the burgess list of such borough." "List" means the roll which is perfected in October and comes into operation on the 1st of November for the ensuing year: *Reg.* v. *Harvey*. (2) No doubt Potts was de facto on the roll in force at the time of election; but as he was not qualified to be on the roll, he was not entitled to be on it, and so is disqualified as a town councillor.

[MELLOR, J. The section says, "not entitled to be on the burgess list," not "not qualified."]

Entitled to be on means something more than on the list de facto. *Reg.* v. *Dixon* (3) was the converse of the present case: it was there held that a person qualified to be on the burgess roll, though not on, was "entitled to be on the list," within the meaning of the section. The statute, therefore, looks at the title de jure, and not merely de facto.

[LUSH, J. In *Reg.* v. *Hodson* (4), it was held too late to move on the 29th of January for a quo warranto information against a burgess who had been put on the roll which came into operation on the 1st of November previously.]

(1) 5 & 6 Will. 4, c. 76, s. 28:—"No person being in holy orders, or being the regular minister of any dissenting congregation, shall be qualified to be elected or to be a councillor of any such borough, or an alderman of any such borough, nor shall any person be qualified to be elected or to be a councillor or an alderman of any such borough who shall not be entitled to be on the burgess list of such borough," &c.

(2) 3 Q. B. 475.

(3) 15 Q. B. 33; 19 L. J. (Q. B.) 363.

(4) 4 Q. B. 648 n.

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Ex parte HINDMARCH.

The applicant does not seek to question the burgess roll, but the right of Potts to be a town councillor.

[COCKBURN, C.J. If no proceedings are taken in due time to remove a man from the burgess list, surely he must be taken to be "entitled to be on the list?" There was a simple course open in order to remove Potts from the list, which was not taken, and it is now sought to question his title in this collateral proceeding. I do not think we ought to allow that to be done.]

The question as to his right to be a councillor could not arise till August.

PER CURIAM.

Rule refused. (1)

Attorneys for Applicant: *Harle & Co.*

Nov. 13.

THE JUSTICES OF LANCASHIRE, APPELLANTS; THE OVERSEERS OF THE TOWNSHIP OF CHEETHAM, RESPONDENTS.

Poor-Rate—Rateable Occupation—Exemption of Buildings used for public purposes—43 Eliz. c. 2, s. 1.

Justices of a county were empowered, under a local act, to provide courts in the city of M. and other necessary accommodation for the holding of the business of the assizes; and they were further empowered to permit the use of such buildings for any lawful purpose, at such times, upon such conditions, and for such consideration as they might think proper, but not so as to interfere with the use of the buildings for the purposes of the assizes. The justices provided courts, &c., for the assizes, and provided in such courts, for the corporation of the city of M., for 900*l.* per annum (viz., 600*l.* for the use and 300*l.* for expenses), all the accommodation required for the city quarter sessions and the city court of record. The 600*l.* was applied by the justices in part payment of the annual expense of keeping up the courts, &c.:—

Held, that the justices were rateable to the relief of the poor for their occupation of the courts, &c., in respect of the 600*l.* per annum; as to such extent they had a beneficial occupation within the principle established by the *Mersey Docks Cases* (11 H. L. C. 443; 35 L. J. (M. C.) 1).

CASE stated under 12 & 13 Vict. c. 45, s. 11, upon an appeal against a poor-rate for the respondent township, in which the appellants, the justices of the county of Lancaster, were rated in

(1) See the preceding case.

respect of their occupation of certain premises, known as the Manchester Assize Courts.

2. By s. 2 of 21 Vict. c. xxiv., the justices of the peace for the county palatine of Lancaster, assembled at any quarter or general sessions, holden originally or by adjournment within the hundred of Salford, were empowered to provide in or near Manchester, within the said hundred, commodious courts, lodgings for Her Majesty's judges, offices, lock-ups, and all other accommodation necessary or convenient for carrying on the civil and criminal business usually transacted at courts of assize.

3. By s. 4, any lands or buildings acquired by the justices under this act might be conveyed to them and their successors; and such justices and their successors were thereby empowered to take and hold, in the nature of a body corporate in trust for the purposes of that act, the lands or buildings so conveyed to them.

4. By s. 5, all the expenses incurred in carrying into effect the purposes of the act were to be defrayed out of the special rate, thereinafter authorized to be assessed and levied from time to time, as the case might require, upon and from the hundred of Salford.

5. By s. 11, the justices assembled as aforesaid were to have the sole and entire control, repair, management and use of all buildings and premises acquired for the purposes of that act; and it was to be lawful for them to use, or permit the use of, any such buildings and premises for any lawful purpose, at such times, in such manner, upon such conditions, and for such consideration as the same justices might think proper, but so as not to interfere with the use of such buildings and premises for the purposes primarily contemplated by that act.

6, 7, 8. Under the powers of the act, the appellants purchased a plot of land situate in the respondent township. At the date of the purchase, several houses and other buildings stood thereon, and were rated and paid rates to the township; these were pulled down, and on the site were built the Manchester assize courts, comprehending the premises in respect of which the rate appealed against was made, and some other buildings connected therewith for the accommodation of the judges and other similar purposes.

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JUSTICES OF LANCASHIRE v. CHEETHAM.

9. The appellants were assessed, in respect of the said buildings, at a rateable value of 5035*l.* 10*s.*

10. The courts are all under one roof, and are used at the county assizes for the hundred of Salford and the city of Manchester, and at the county sessions for the hundred, and by special agreement with the city of Manchester, as hereinafter mentioned, for the city sessions and city court of record.

11, 12, 13. The money borrowed for the erection of the courts, and the purchase of the site for them, amounts to the sum of 68,500*l.*, and the interest paid thereon in 1866 was 3690*l.* 3*s.* 5*d.*

14. The recited act provides that the money borrowed shall be repaid within twenty years, the period limited by the "Commissioners' Clauses Act, 1847."

15. The expenses of maintenance and management for the year ending on the 31st of May, 1866, amounted to 1823*l.* 17*s.* 11*d.*, which sum, it is estimated, may be considered as the average of those expenses.

16. The sum raised by the special rate, authorized to be raised by the above recited act during the year ending the 31st day of May, 1866, was 12,705*l.* 5*s.* 2*d.*, which was applied partly in paying the current expenses and the interest on taxes.

17. The residue has been expended in completing, decorating, and furnishing the courts and judges' house, and in providing the sinking fund for paying off the mortgage debt, as required by the Commissioners' Clauses Act, 1847.

22. By agreement between the appellants and the corporation of the city of Manchester, all the accommodation required for both the city quarter sessions and the city court of record, is provided in the assize courts, the corporation paying to the justices the sum of 600*l.* per annum for the same, and 300*l.* per annum to cover all incidental expenses, including cleaning, gas, fire, &c., the corporation of the city providing the necessary police.

23. There are no other sources of income to the justices from the use of the buildings, and all sums received in respect of their use are applied by the justices in aid of the special rate.

24. The sum of 900*l.* paid by the corporation of the city of Manchester, as before mentioned, and the sums received from all

other sources as above mentioned, were applied in part payment of the sum of 1823*l.* 17*s.* 11*d.*, above stated to have been the expenses of maintenance and management during the last year, and the balance of those expenses was defrayed out of the special rate authorized to be raised by the recited act.

26. The questions for the decision of the Court were—1. Are the appellants occupiers of the above premises within the statute of 43 Eliz. c. 2? 2. Whether of the whole or of any, and what separate parts?

Mellish, Q.C. (*Hopwood* with him), for the respondents. The justices have power, under 21 Vict. c. xxiv. s. 11, to use, and to allow to be used, any of these buildings, as they may think fit, subject to the purpose primarily contemplated. The justices have availed themselves of this power, and have let the buildings for 600*l.* per annum, clear of expenses. To the extent of 600*l.* per annum they have, therefore, a beneficial occupation. The fact that the buildings are let for a public purpose does not relieve the justices from liability to the poor rate: *Mersey Docks Cases.* (1)

Manisty, Q.C. (*Holker* with him), for the appellants. The justices are not liable to be rated to the relief of the poor, because they have no beneficial occupation. They occupy solely for the administration of justice, as servants of the crown, and their occupation is, therefore, the occupation of the crown. Moreover, the premises do not yield, and are not capable of yielding, a net revenue above what is required for their maintenance.

COCKBURN, C.J. I think that the case comes clearly within the principle of the *Mersey Docks Cases.* (1) I quite agree that the purposes for which the buildings are used are public purposes. But the justices, who would not otherwise be rateable, are empowered to employ the buildings for any lawful purpose, out of which a profit may be made. Under this power they let the buildings to the corporation of Manchester for 900*l.* per annum, the result of which is that they receive a profit of 600*l.* per annum. The *Mersey Docks Cases* (1) shew that, whatever the object of the occupation may be, yet, if profit be made, the premises are liable

(1) 11 H. L. C. 443; 35 L. J. (M. C.) 1.

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to be rated in respect of such profit. Therefore, in this case, the justices must be rated upon the 600*l.*

LUSH, J. I am of the same opinion.

Rate to be amended accordingly.

Attorneys for appellants: *Ridsdale & Craddock, for Burchell & Wilson, Preston.*

Attorneys for respondents: *Bower & Cotton.*

Nov. 25.

BARON HERMAN DE MESNIL *v.* DAKIN AND ANOTHER.

Sheriff—Arrest on Mesne Process—Mistaken Identity—Payment of Money in lieu of Bail—43 Geo. 3, *c.* 46, *s.* 2.

The plaintiff having been arrested by a sheriff's officer under a capias to hold to bail against another person, protested that he was not the right person; but in order to obtain his release he paid the sum endorsed, &c., and the officer released him, under the 43 Geo. 3, c. 46, s. 2. The money having been paid into court by the sheriff, the usual summons was taken out and served on the plaintiff; but he did not appear, and the money was paid to the person at whose suit the plaintiff had been arrested:—

Held, that the plaintiff was not precluded from recovering the money from the sheriff.

FIRST COUNT, for assault, false imprisonment, and for detaining the defendant in prison until he had paid the sum of 50*l.* to procure his liberty.

Second count, for money had and received.

Pleas: to the first count, 1. Not guilty. 2. A general justification under a writ of capias. 3. That a writ of capias was issued under a judge's order commanding the defendants, as sheriff of Middlesex, that they should take the plaintiff, who was therein described by the name of Baron Oscar de Mesnil, of 36, Duke Street, St. James's, and him safely keep until he should have given bail or made deposit with the defendants, according to law, in an action at the suit of Samuel Merry, &c. The plea went on to allege the arrest of the plaintiff, and averred that the plaintiff was at the time of the issuing of the writ and of the arrest commonly called or known by the name of Baron Oscar de Mesnil; and that

the plaintiff was the person intended to be sued in the action, and the person intended to be taken under the writ; that, immediately after the arrest, the plaintiff deposited with the defendants the amount endorsed in the writ, together with 10*l.* for costs, according to the statute; and thereupon he was discharged out of custody, and the defendants duly paid the two sums into court. That special bail was not duly put in or perfected by the present plaintiff, whereupon this Court, after notice was duly given to the present plaintiff, ordered the sums to be paid out to the plaintiff in the action; and the plaintiff in the action received the same, of which the present plaintiff had due notice; and no proceedings were ever taken by the present plaintiff to set aside the writ. 4. To the second count, never indebted.

The plaintiff joined issue on the pleas; and for a second replication to the third plea, set out the writ of capias with its endorsements; and averred that the names of the plaintiff were, and always had been, Baron Herman de Mesnil, and not Baron Oscar de Mesnil; and that the plaintiff had never at any time been commonly called or known by the names of Baron Oscar de Mesnil, or otherwise than by the names of Baron Herman de Mesnil; and that the plaintiff was not the person so in the writ named, and was never at any time served with any writ of summons in the action in which the writ of capias was issued, and never appeared as or otherwise became the defendant in any such action, and was not nor is the defendant in any such action; of all which premises the defendants had notice.

The defendants joined issue upon the plaintiff's replication.

The cause was tried before Cockburn, C.J., at the sittings in Middlesex after Hilary Term, 1867. The facts, which are sufficiently stated in the judgment of the Court, went to prove the allegations in the third plea and replication as to the arrest of the plaintiff; the only question being, whether Merry had given credit to the plaintiff, under the idea that his name was Oscar, or whether the plaintiff's brother, Oscar, was the person to whom credit had been given and whom Merry intended to sue. The Chief Justice left this question to the jury, which they found in favour of the plaintiff, and returned a verdict for the plaintiff for 70*l.*, being 50*l.*, the amount paid by him to the sheriff's officer, and

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20*l.* damages for the illegal arrest; leave being reserved to reduce the verdict by the 50*l.*, if the Court should be of opinion that, under the circumstances, the plaintiff was precluded from recovering it.

A rule having been obtained accordingly,

Nov. 11. *J. D. Coleridge, Q.C.* (*Houston* with him), shewed cause. The jury having found that Merry intended to sue Oscar de Mesnil, it cannot be said that this is a case of misnomer. The sheriff has arrested the wrong person. The plaintiff has a perfect right to take his own course, and he has throughout treated the matter as a wrongful arrest. It is true he paid the sum of 50*l.* to the officer, but he was compelled to do so to obtain his release. The sheriff may have paid the money into court, and the Court may have ordered it to be paid to Merry; but it is a matter of no concern to the plaintiff what became of the money. [He was then stopped by the Court.]

Quain, Q.C., and *J. C. Day*, in support of the rule. At common law, on an arrest under mesne process, a defendant was not entitled to be discharged out of the custody of the sheriff, even on payment of the debt and costs; but under the 43 Geo. 3, c. 46, s. 2 (1), on

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(1) 43 Geo. 3, c. 46, s. 2:—"And whereas it does and may happen that persons arrested upon mesne process may not be able to find sufficient sureties for their appearance at the return of the writ, and yet may be able to make a deposit of the money for which they are so arrested, together with a competent sum for costs; and whereas it is expedient that persons arrested should, upon making such deposit, be permitted to go at large until the return of the writ without finding bail to the sheriff for their appearance at the return thereof; be it therefore enacted, that all persons who shall be arrested upon mesne process, within England and Ireland, shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him, or to his under sheriff, or other officer to be by him appointed for that purpose, the sum indorsed upon the writ by virtue of the affidavit for holding to bail in that action, together with 10*l.* in addition to such sum to answer the costs which may accrue or be incurred in such action up to and at the time of the return of the writ; and also such further sum of money, if any, as shall have been paid for the king's fine upon any original writ; and shall thereupon be discharged from such arrest as to the action in which he, she, or they shall so deposit the sum indorsed on the writ; and that the sheriff shall, in every such case, at or before the return of the said writ, pay into the court in which such writ shall be returnable the sum of money so deposited as aforesaid; and thereupon, in case the defen-

depositing with the officer the sum endorsed on the writ, with 10*l.* for costs, he is entitled to his discharge. The plaintiff having availed himself of the statute to obtain his discharge, is estopped from denying that he is the defendant in the action of *Merry* v. *De Mesnil.* The capias was, no doubt, against Oscar de Mesnil, but that was an irregularity which was waived by the plaintiff depositing the money with the sheriff. Secondly, the plaintiff had notice that an application would be made by Merry to a judge, to have the money paid out of court; and, had the plaintiff opposed the application, the judge would not have ordered the payment: *Cadby* v. *Parsons* (1), *Kelly* v. *Lawrence.* (2) The plaintiff cannot recover it back, as it was paid in a judicial proceeding: *Reynolds* v. *Wedd.* (3)

Coleridge, Q.C., was then again called upon. The plaintiff did not deposit the money under the statute, but, being wrongfully arrested, he paid it under duress, to obtain his discharge. The statute applies only to persons who are sued as defendants, and not to persons whom it was never intended to sue. The plaintiff is not estopped by not opposing the payment of the money, as the proceedings are vicious from the commencement, and as against him null and void.

Cur. adv. vult.

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dant or defendants shall afterwards duly put in and perfect bail in such action according to the course and practice of such court, the sum of money so deposited and paid into court as aforesaid shall, by order of the court, upon motion to be made for that purpose, be repaid to such defendant or defendants; but in case the defendant or defendants shall not duly put in and perfect bail in such action, then and in such case the said sum of money so deposited and paid into court as aforesaid, shall, by order of the court, upon a like motion to be made for that purpose, be paid over to the plaintiff or plaintiffs in such action, who shall be thereupon authorized to enter a common appearance or file common bail for such defendant or defendants, if the said plaintiff or plaintiffs shall so think fit; such payment to the plaintiff or plaintiffs to be made subject to such deductions, if any, from the sum of 10*l.* deposited and paid to answer the costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of his application to the court in that behalf, may be found reasonable." And see 1 & 2 Vict. c. 110, ss. 1—4.

(1) 5 Taunt. 623.
(2) 3 H. & C. 1.
(3) 6 Dowl. 728.

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Nov. 25. The judgment of the Court (Cockburn, C.J., Mellor, and Lush, JJ.) was delivered by

COCKBURN, C.J. This was an action for false imprisonment. The facts were these: A writ of capias to hold to bail (1) had been issued against a Baron Oscar de Mesnil, the brother of the plaintiff. On this process, the plaintiff, the Baron Herman de Mesnil, was arrested at his own residence, 36, Duke Street, St. James's, by an officer of the defendants, the sheriff of Middlesex. The plaintiff protested against the arrest, informing the officer that he was not the party against whom the writ was directed, he being the Baron Herman, and not Oscar de Mesnil, who was his brother. The officer hereupon inquired whether any other Baron de Mesnil resided in the house, and, having received an answer in the negative, declared his intention of persevering in the arrest. The plaintiff then asked what could be done to prevent the necessity of his being removed in custody; to which the officer replied that by depositing with him the amount of the debt and 10*l.* for costs, the plaintiff might get rid of the arrest. A sum of 50*l.* was accordingly paid by the plaintiff to the officer, and the latter then withdrew.

The money thus received was in due course paid into court by the sheriff. Bail not having been perfected, or any step taken by the present plaintiff, the party arrested, a summons was served on the present plaintiff, by Merry, the plaintiff in the action, to shew cause why the money should not be paid over to him. (2) The present plaintiff, however, declined to attend on the hearing of the summons, his attorney assigning as a reason an apprehension that his client, not being the real defendant in the action, might, by attending, be taken to acknowledge the validity of the arrest, and thereby prejudice his right of action against the sheriff. No cause being shewn on the summons, an order was made according to its tenor, and the money was paid over to Merry, the plaintiff in the orignal action. It was to recover back this 50*l.*, as also to recover damages for the arrest, that the present action was brought.

(1) See ante, p. 20, n. (1)

(2) The summons was headed *Merry Baron Oscar de Mesnil*, and was in the usual form, "Let the defendant" and the sheriff, &c.

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At the trial an attempt was made on the part of the defendants to shew that, though the writ of capias was directed against the Baron Oscar de Mesnil, yet the plaintiff, Baron Herman, was the person really intended; in other words, that the mistake was one of name only, not of identity. This question having, however, been left to the jury, they expressly found that credit had been given to, and the writ intentionally directed against, the Baron Oscar. It must, therefore, be taken that the present plaintiff was arrested on process intended against another person, and that the arrest was consequently illegal. Upon this finding of the jury, as stated, a verdict was entered for the plaintiff for the 50*l.* deposited in lieu of bail, as well as for the amount of damages awarded by the jury in respect of the false imprisonment, leave being reserved to the defendants to move to reduce the damages in respect of the sum of 50*l.*

A rule nisi having been obtained accordingly, upon the argument before us on the rule, two points were made for the defendants: first, that the plaintiff, having paid the 50*l.* under the 43 Geo. 3, c. 46, s. 2, must be taken to have done so in the character of defendant in the action, and consequently was estopped, as having taken a material step in the cause, from disputing the fact of his being the defendant; secondly, that the plaintiff, having lain by, and allowed the sheriff to pay over the money deposited in lieu of bail, and having further allowed the plaintiff in the action of *Merry* v. *de Mesnil* to take the money out of court without opposition on his part, had precluded himself from recovering back the money from the sheriff.

The first of these grounds has alone given us any difficulty. We were struck by the argument that the plaintiff, by depositing money in lieu of bail in the action of *Merry* v. *de Mesnil*, had adopted the character of defendant in that suit, and was, therefore, estopped from denying the fact of his having been such defendant.

On further consideration, however, we think the position cannot be maintained that a party wrongfully arrested under a mistake as to his identity, and who, while protesting against the arrest, deposited money in order to obtain his discharge, must necessarily be taken to have assumed the character of defendant, and to have

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paid the money in that character. The legislature, in passing the act referred to, may possibly have had the case of persons properly served with process alone in contemplation; but the words of the enactment are large enough to embrace the case of a person arrested under a mistake as to identity; and it would be a grievous hardship on a person so arrested, and protesting against the propriety of the arrest, if he were debarred from having the advantage of the statute, except on the condition of taking upon him the character of defendant and admitting the validity of the arrest. Nor is any additional hardship hereby cast on the sheriff. The sheriff has eight days before he is bound to pay the money deposited into court. He has, therefore, time to satisfy himself as to the identity of the party arrested, and if he finds that he has arrested the wrong man, and therefore has wrongfully taken the money of the latter as the price of his liberation, he would be fully justified in returning the money, and when called upon by the plaintiff in the action to pay the money into court, would have a good answer to such an application in the fact that the money had been wrongfully taken on an illegal arrest. If, indeed, the money were paid by a party improperly arrested without notice being given to the sheriff of the mistake, the case might be different; there, possibly, it might be held that the party was estopped from disputing the legality of the arrest. But we think that this consequence does not follow where the party arrested pays the money under the duress of an arrest on the illegality of which he insists at the time, and pays it as the price of his liberation.

We are, therefore, of opinion that the first ground taken by the defendants fails.

The second ground, namely, that the plaintiff, by lying by and allowing the money to be taken out of court without opposition on his part, has precluded himself from bringing an action against the sheriff, appears to us altogether untenable.

The original arrest having been wrongful, and consequently the exaction of the money as the price of the plaintiff's liberation wrongful also, no subsequent intervention of the plaintiff was necessary to entitle him to redress. By merely remaining passive as to what might afterwards take place between the sheriff and the plaintiff in the action of *Merry* v. *de Mesnil* in dealing with the

money, his right to recover back money obtained from him by means of an illegal arrest and paid as the price of his liberty cannot be affected.

The rule to reduce the damages must be discharged.

Rule discharged.

Attorney for plaintiff: *C. P. Froom.*

Attorneys for defendants: *Burchell & Hall.*

GLOVER *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Nov. 5.

Action for Assault—Consequential Damage—Railway Company.

The plaintiff was travelling with other passengers in a carriage of a railway company, and on the tickets being collected there was found to be a ticket short. The plaintiff was charged by the collector with being the defaulter, and on his refusing to pay the fare or leave the carriage, he was removed from the carriage by the officers of the company without any unnecessary violence. It turned out that the plaintiff had a ticket. And he brought an action for the assault against the company, laying as special damage the loss of a pair of race-glasses, which he had left behind him in the carriage when he was removed. There was also a count in trover; but there was no evidence that the glasses had come to the possession of any of the company's servants:—

Held, that the plaintiff could not recover for the loss of the glasses.

FIRST COUNT. That the defendants assaulted, beat, and otherwise ill-treated the plaintiff, and forced him out of a railway carriage of the defendants, in which he then lawfully was a passenger to be carried by the defendants on a certain journey for reward to the defendants, by means of which the plaintiff suffered pain, &c., and was put to expense for medical assistance, and for excess of fare, and lost in the scuffle a pair of race glasses belonging to him.

Second count. That the defendants seized and took a pair of opera glasses of the plaintiff, and converted them to their own use, and deprived the plaintiff of them. (1)

Pleas: to the first count, 1. Not guilty. 2. That, at the time of the alleged trespasses, the plaintiff was travelling, and at-

(1) There was a third count for not carrying the plaintiff from London to Ascot and back, but the point reserved only applied to the first two counts.

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tempting to travel, in the railway carriage on the journey without having previously paid his fare, and with intent to avoid payment of it, whereupon the defendants, by their officers and servants, requested the plaintiff to pay the fare or leave the carriage, both of which the plaintiff refused to do, whereupon the defendants, by their officers and servants, gently laid hands on the plaintiff, in order to remove him, and removed him from the carriage, doing no more than was necessary for that purpose, which are the alleged trespasses pleaded to, and were committed after the passing of the Railway Clauses Act, 1845. (1)

3. To the second count, not guilty.

Issue joined and taken.

At the trial before Cockburn, C.J., at the sittings in Middlesex, after Hilary Term, it appeared that, on the 29th of May, 1866, the plaintiff was travelling, with other persons, in a second class carriage on the defendants' railway, from Ascot to London, and at Clapham junction, where the tickets are collected, the collector, finding that there was one ticket short, charged the plaintiff with not having a ticket, and on his refusing to pay the fare or leave the carriage, he was forcibly removed by the defendants' servants. The plaintiff swore that he had taken a ticket from London to Ascot and back, but he admitted that he had retained the whole ticket at Ascot; and the defendants' evidence at the trial went to shew that he had, by giving one half to a friend, and keeping the other half himself, endeavoured to enable the friend to travel without paying his fare.

The plaintiff alleged that he had been treated with great violence; and that he was dragged from the carriage, and left a pair of race glasses, which he valued at seven guineas, behind him in the carriage. The defendants' witnesses negatived any more force or violence than was actually necessary having been used; and the plaintiff was allowed to proceed by a subsequent train on paying his fare from Ascot.

The plaintiff sought in the action to recover, in addition to damages for the assault, the value of the glasses.

(1) Relying on ss. 103 and 104 of 8 Vict. c. 20, which authorize the officers and servants of a railway company to detain any person who attempts to travel in any carriage of the company without having paid his fare, and with intent to avoid payment of it.

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The Lord Chief Justice told the jury that, as it now appeared that the plaintiff had taken and paid for a ticket (for his evidence was uncontradicted as to that), the justification in the special plea was not proved (1), and they must, therefore, find a verdict for the plaintiff; but if they came to the conclusion that the plaintiff was endeavouring to enable his friend to perpetrate the fraud alleged, and if they believed the defendants' witnesses that there was no extra violence, they would probably think nominal damages quite sufficient to meet the justice of the case. As to the race glasses, they might be put out of consideration, unless the jury were satisfied that the glasses came into the possession of some of the defendants' servants; and the Chief Justice was of opinion that the damage from their loss was too remote if some one else took them.

The jury returned a verdict for the plaintiff for 20*s.*, leave being reserved to increase it by 7*l.* 7*s.*, the value of the glasses.

A rule was obtained accordingly, on the ground, first, that the loss of the glasses by the plaintiff was the direct consequence of the illegal conduct of the defendants as stated in the first count; secondly, that the plaintiff was also entitled to recover the value of the glasses under the second count.

Ballantine, Serjt., and *C. W. Wood*, shewed cause. It must now be conceded that the defendants were not justified in what they did; but the loss of the glasses is too remote to be treated as damage consequent on the defendants' wrongful act. The plaintiff was the only person to blame for having negligently left the glasses behind on the seat of the carriage.

[LUSH, J. The plaintiff was forcibly taken from the carriage. If a watch or purse had been shaken from the person of a passenger in wrongfully removing him, might not the loss be treated as the natural consequence of the wrongful act?]

Perhaps so; but that is not the present case. The jury, by their verdict, must be taken to have negatived all violence beyond the forcible persuasion necessary to induce the plaintiff to leave the carriage; and he might have got the glasses, if he had them really with him, and had only asked for them. There was also no evidence that the glasses were ever in the defendants' possession, either

(1) See ante, p. 26, n. (1).

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as carriers or otherwise: *Le Conteur* v. *London and South Western Railway Company.* (1)

M. Chambers, Q.C., in support of the rule. It is too late now to raise any doubt whether the plaintiff had the glasses. The defendants are wrongdoers, and are liable for all the consequences of their illegal act. The plaintiff can also recover under the second count. The evidence of the plaintiff, which was not materially contradicted, was, that he left them in the defendants' carriage.

[COCKBURN, C.J. The jury must be taken to have negatived that the glasses came to the possession of the company's servants.]

At all events the first count is sustained. It was the natural consequence of the plaintiff being forcibly removed that the glasses were left behind, and so lost.

COCKBURN, C.J. I am of opinion that the rule should be discharged. The facts, as they must be taken to have been found by the jury, are simply these. The plaintiff, by giving half of his own ticket to his friend, was endeavouring to enable the latter to travel without paying his fare; on its being discovered that there was but one ticket between the two, the plaintiff was desired to pay the fare or leave the carriage, and on his refusing he was removed from the carriage. It turned out, unfortunately, that the plaintiff had taken and paid for a ticket, and that it was his friend who ought to have been treated as the defaulter. Consequently, the justification pleaded by the defendants failed. With regard to this part of the case the jury gave the plaintiff 20s., and the question remains whether the plaintiff is entitled to recover as damages the value of the race-glasses. He said he left the pair of glasses in the carriage. There was no cross-examination, and no serious intention to dispute the fact that he had them with him; it must, therefore, be taken that he had them with him, and that he left them behind when he was removed from the carriage. It must also be taken that the jury have found that the glasses did not come into the possession of any of the defendants' servants. The glasses were simply left behind in the carriage. The case would be very different, in my judgment, if the glasses had fallen from the plaintiff's person as the immediate result of any violence

(1) Law Rep. 1 Q. B. 54. 12 Jur NS 266

offered to him. But the jury must be taken to have negatived—and rightly, as it seemed to me—any violence beyond that necessary to remove the plaintiff from the carriage. So that it was not the case of a man being dragged out of a carriage under circumstances which rendered it impossible for him to take the property with him, which he had under his own personal protection. The plaintiff, being called upon to leave the carriage, refused, and he was forced by the defendants' servants to leave, but not with the excessive violence he alleged, for the jury believed, as I did, the defendants' witnesses. No doubt if he had applied to be allowed to get the glasses, or asked one of the passengers to hand them to him, this would have been done. He has, therefore, only himself to blame that the glasses were left in the carriage; and the loss, therefore, was not the necessary consequence of the defendants' act, but owing to the plaintiff's own negligence or carelessness. This head of damage, therefore, is too remote, and the plaintiff cannot recover it.

LUSH, J. I am of the same opinion. There was no evidence to charge the defendants, as carriers, with the loss of the glass. The plaintiff kept it under his own care, just as much as a watch or purse in his pocket, and it was never intrusted to the defendants to carry. Can, then, the loss be treated as damage resulting from the wrongful act of the defendants? The question is, is the loss the direct and immediate result of the unlawful act? The evidence does not go the length of shewing this. All the plaintiff says is: "I was dragged out of the carriage, and left the glasses in the carriage." The witnesses for the defendants deny violence having been used; and the Lord Chief Justice says the jury were fully justified in believing them. So that it cannot be said that the plaintiff was prevented from taking the glasses from the carriage with him; he might have got them had he asked for them. He left them, therefore, either voluntarily, or through negligence; and whether one or the other, it is clear that the loss was not the immediate result of the defendants' wrongful act.

Rule discharged.

Attorneys for plaintiff: *Lewis & Lewis.*
Attorney for defendants: *L. Crombie.*

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Nov. 13.

GARNETT AND OTHERS, APPELLANTS; BACKHOUSE, RESPONDENT.

Salmon Fishery Act, 1861 (24 & 25 *Vict.* c. 109), *ss.* 4, 12—*Salmon Fishery Act*, 1865 (28 & 29 *Vict.* c. 121), *s.* 42—"*Fishing Mill-dam*"—*Jurisdiction of Commissioners—Practice—Right to Begin.*

C.P. 1868

By s. 4 of the Salmon Fishery Act, 1861, "'fishing mill-dam' shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes":—

Held, that a dam built solely for milling purposes, and without any contrivances for catching fish, is not a fishing mill-dam within this section, although it does in fact render it more easy to catch fish than would have been the case if there had been no dam, and although the owners of the dam have occasionally availed themselves of the facility so afforded for the purpose of catching fish; and such a dam, therefore, cannot be abated under s. 42 of the Salmon Fishery Act, 1865.

Any person so catching fish is, however, liable to the penalties imposed by s. 12 of the Act of 1861.

In appeals on a case stated under the Salmon Fishery Act, 1865, the party who occupies the position of prosecutor has the right to begin.

CASE stated by the Special Commissioners for English Fisheries pursuant to the Salmon Fishery Amendment Act, 1865, which (s. 45) incorporates 20 & 21 Vict. c. 43.

2. By the Salmon Fishery Amendment Act, 1865, s. 42 (1) the commissioners may inquire into the legality of fishing weirs and fishing mill-dams, and shall remove such fishing weirs, and cause to be rendered incapable of catching fish, such fishing mill-dams as are in contravention of the Salmon Fishery Act, 1861 (2). Sect. 4 of the latter act, which is to be read as one with the Salmon Fishery Act of 1865 (3), defines the meaning of "fishing mill-dam" to be "a dam used partly for the purpose of catching, or facilitating the catching, of fish, and partly for the purpose of supplying water for milling or other purposes."

3. At a court held by the commissioners at Preston, in Lancashire, on the 5th of October, 1866, and the 3rd of January, 1867, for the purpose of inquiring into the legality of the fixed engines, fishing weirs, and fishing mill-dams situate in the Ribble fishery district, the appellants were summoned (4) for the purpose of in-

(1) 28 & 29 Vict. c. 121.
(2) 24 & 25 Vict. c. 109.
(3) See 28 & 29 Vict. c. 121, s. 2.
(4) Under ss. 43, 44, of 28 & 29 Vict. c. 121.

quiring into the legality of a mill-dam situate in the river Ribble, at Low Moor, near Clitheroe, of which the appellants were owners. The mill in connection therewith was a cotton mill, and had two wheels and a turbine, all supplied with water from the river.

4. At the place in question the river Ribble is not navigable, and is a salmon river, and there are above and below the dam spawning beds of great value, to which the fish resort. The appellants are owners in fee of the land on the left bank, or Lancashire side, of the river, and have a lease of the land on the right bank. The dam which pens the water up for the supply of the mill is situate about two-thirds of a mile above the mill, and the water which passes down the mill-leat, and through the mill, is returned to the channel of the river about 100 yards below the mill. The length of the natural channel of the river, between the dam and the point where the water after passing through the mill is returned to the river, is rather more than two-thirds of a mile, and the appellants are owners or lessees of the land on both sides of all this part of the river.

5. The mill-dam crosses the bed of the river nearly at right angles, but in a crescent form, and is in its lower part a solid structure of stone and mortar. The upper part of the dam consists of planks, about twenty inches wide, set on their edges, and these planks accordingly add twenty inches of height to the stonework on which they rest. The sluice of the mill-leat is on the left bank of the river, and forms the end of the dam at that side. At the other end of the dam, which adjoins the opposite, or right bank, a part of the stonework for a length of about seventeen feet is twelve inches lower than the remaining stonework of the dam, and the top of this part which also consists of wood the same height as the planking on the top of the remaining part of the dam, is called a baulk. This baulk, which is in fact a strong piece of wood seventeen feet long and thirty inches deep, has a hinge at one end, and is capable of being raised by means of a screw, so that when raised perpendicularly on the hinge it makes a triangular opening in the body of the dam, the opening at the wide end being about two feet. This was constructed by one of the appellants more than forty years ago.

6. The bed of the river immediately under the dam is rocky,

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and there are several pools from three to six feet deep close to the lower side of the dam and the bed of the river, between the mill-dam and the place where the mill-race rejoins the river, a length which is above two-thirds of a mile, is also rocky, but there are occasional pools of water. The stonework part of the dam on its lower side, or face, is perpendicular, and varies from eight feet to eighteen inches high above the bed of the river, and the planks add twenty inches more to this height. When the baulk is shut salmon cannot jump over the dam, owing to its height. During the four driest months of the year, whenever the baulk is shut, the bed of the river for about two-thirds of a mile is nearly dry, but during the night the baulk is usually left open. When the baulk is shut during the day, the whole of the water of the river passes down the mill-race to supply the mill, there being then not enough of water for such supply. During that time salmon cannot pass up the channel of the river towards the mill-dam, or can do so on very rare occasions of flood, and when they arrive at the dam it is too high when the baulk is shut to allow them to jump over, so as to reach the spawning grounds above the dam. But, on all occasions of flood, the baulk is kept open both night and day. In their efforts to get up to the mill-dam the fish are often found lying in small pools of water, and can be caught by hand in the shallows, or can be easily fished out of the pools with a net.

7. There is no box, cruive, or crib, or appliance, or contrivance of any kind whatever for catching fish placed immediately behind, or as part of the mill-dam.

8. It was stated by the appellants' witnesses that the mill-dam had been built in 1784, but no document of title was produced by the appellants earlier than a lease for a term of eleven years, made in 1820, in favour of the appellants' predecessors, who had since then purchased the fee of the left bank of the river adjoining the mill-leat or race, the appellants' counsel stating, as a reason, that he relied upon user. It was further proved that the baulk, or moveable board, was lifted only when there was enough water to supply the mill. The baulk had been put up by the owners of the dam to enable fish to get over the dam, but they stated that there was no obligation on them to make such a baulk. The appellants' witnesses stated that the dam, and the planks on the top of it, had

existed as they were now more than fifty years. In order to facilitate the ascent of fish, an artificial pass, or slope, consisting of large stones and planks of wood, leading up to the baulk, has been made, and the fish can for the most part, by means of these planks, get up to and through the opening made by the baulk when such baulk is lifted, and thereby an opening is made in the dam.

9. The appellants have authorized, on one occasion, a person who owned the other half of the river, to fish the mill-pool above the dam, and the appellants themselves have caught fish in the river below the dam; when the water is low, the pools are easily fished; but they stated that this was merely to supply their table, or to give presents to friends. They also stated that they had never sold a fish since they had owned the fishery, nor let the right to any person, and for one period of ten years they neither caught nor permitted one to be caught. They have caught the fish by means of a net dropped in a pool, which is situated about sixty yards below the dam, and when so doing have employed men on one or two occasions to beat the water from a point about thirty or forty yards nearer the dam down to this pool, and they have the exclusive right to catch as many fish as they please there, both sides of the river being their own property. The appellants have also, occasionally, found salmon lying almost dry in the bed of the river, below the dam, after a flood.

10. On the part of the respondent it was proved by a water-bailiff, who had constant opportunities of watching the effect of the mill-dam on the fish, that it would greatly facilitate the capture of the fish. That when the baulk was suddenly shut down when the water was low, and the bed of the river was thereby made nearly dry, the fish could be caught by hand as they lay stranded on the bank, or they could be easily taken by means of a net out of the few pools left. That he had seen the appellants with a net there, and catching the fish. That he had found fish, heavy with spawn, lying unable to move in the shallow water created by the mill-dam, and had occasionally, with his own hands, lifted them over the dam, and he thought that the planks on the top of the weir had been gradually made higher during the last thirty-five years on each occasion when they were renewed, and that though some fish got through the baulk when it was open, others were

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unable to do so, and when the baulk was shut no fish could get over, and that, consequently, the fish often crowded at the foot of the dam waiting to pass over, but being unable to do so.

12. It was further proved by the respondent that, in its present state, the mill-dam, when the baulk was down, hindered the fish from going up the river to spawn, and that in order to allow sufficient water to flow over the dam constantly down the natural channel of the river, and at the same time to permit the fish to go up to and over the dam, it was necessary that the planks along the top of the stonework should be removed altogether, and that the baulk should be removed, and also two inches more should be cut away immediately under the baulk.

15. The commissioners found, as facts, that this mill-dam had been built subsequent to 1714; that the planks on the top of the stonework had been first put there subsequent to 1829, and that the dam had been used in its present state since that time. That the dam facilitated the catching of fish, and had been used by the owner for that purpose. That the dam also hindered the fish from passing up the river to spawn, and that in order to render the dam incapable of catching fish, with the least injury to the milling power, it was necessary that the planks should be removed altogether, and also the baulk, and two inches more under the baulk, and so kept during the whole year.

16. They also held that the dam was a fishing mill-dam within the definition of the Salmon Fishery Act, 1861 (1), and that they had jurisdiction to inquire into its legality, and that the ss. 23—25 of 24 & 25 Vict. c. 109, applied only to cases where volunteers put fish passes at their own risk, but not to this case. That by reason of the express prohibition of the statute of 1 Geo. 1, st. 2, c. 18, s. 14, this dam had been illegal up to 1861, so far as it so hindered the fish going up to spawn, that the Prescription Act had no application, seeing that the right claimed under it had been used in contravention of an express prohibition of a statute. That as this dam was illegal up to 1861, it had not been made legal since, and they made an order that the dam should be made incapable of catching fish, by removing, permanently, the planks along the top of the stonework of the weir, by permanently

(1) 24 & 25 Vict. c. 109, s. 4; see post p. 36 n. (1).

removing the baulk, and two inches more immediately under the baulk. At the same time the commissioners were of opinion that if, in carrying out their order, the appellant satisfied them that an efficient fish-pass could be made by a less alteration of the dam, this part of the order would not be insisted upon.

17. The questions for the Court were:—1. Whether, upon the evidence, the commissioners were bound, as matter of law, to hold that this dam was not a fishing mill-dam within the meaning of the Salmon Fishery Act, and so that they had no jurisdiction to inquire into its legality? 2. If they had jurisdiction, whether by reason of the user since 1829, the Prescription Act rendered the dam legal in its present state, notwithstanding the 1 Geo. 1, st. 2, c. 18, s. 14? 3. Whether, if the dam was illegal up to 1861, so far as it hindered fish passing up to spawn, it has since been rendered legal in that respect by means of the Salmon Fishery Acts? 4. Whether there was evidence to justify the commissioners in making the order above stated?

Counsel asked the direction of the Court as to which party should begin; the Court decided that the respondent was entitled to begin, in accordance with the rule that the person who sets the law in motion is usually, in such cases, entitled to that right.

Hannen (the *Attorney-General* with him), for the respondent. The first question is, whether the commissioners had jurisdiction over this dam. Their jurisdiction depends upon s. 42 of the Salmon Fishery Act, 1865. (1) Under this section, they may inquire into the legality of fishing mill-dams, and cause such fishing mill-dams as are in contravention of the Salmon Fishery Act, 1861, to be rendered incapable of catching fish. This statute is to be read as one with the act of 1861 (2), which by s. 4 defines the meaning of

(1) 28 & 29 Vict. c. 121, s. 42, enacts, that "the commissioners may inquire into the legality of all fishing weirs and fishing mill-dams throughout the limits of the Salmon Fishery Acts, 1861 and 1865, and shall remove such fishing weirs and cause to be rendered incapable of catching fish, such fishing mill-dams as are in contravention of the Salmon Fishery Act, 1861."

ss. 44 & 45 contain directions for the conduct of the proceedings at the hearing before the commissioners, and as to appeals from their decision.

(2) See 28 & 29 Vict. c. 121, s. 2.

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the words, "dam," fishing weir," and "fishing mill-dam." (1) The commissioners have, therefore, jurisdiction under these acts to inquire into the legality of this dam, as a fishing mill-dam, if it was used for the purpose of catching, or facilitating the catching, of fish. It is stated in the case that the dam was used for the purpose of catching fish, for the owners of the dam did catch fish occasionally, and in so doing availed themselves of the facilities afforded by the dam, and by the formation of the bed of the river. The fact that the fish so caught were never sold has nothing to do with the question: they were caught by means of the dam, and that is enough. It is also clear that the dam did facilitate the catching of fish, for it is stated in the case that the fish could sometimes even be caught by the hand. The commissioners had, therefore, jurisdiction, because the dam was used for the purpose of catching fish; and because it did, in fact, facilitate the catching of fish. If the commissioners have not jurisdiction over a dam such as this, there will be no remedy against the mischief for which the acts of 1861 and 1865 were intended to provide.

The second question is, whether the commissioners, assuming they had jurisdiction, were right in ordering the dam to be rendered incapable of facilitating the catching of fish. This depends upon whether the dam was or was not a fishing mill-dam, in contravention of the Salmon Fishery Act, 1861; and this, again, depends upon whether it was legal at the time of the passing of that act. (2) The dam could not have been legal at the time of the passing of the act of 1861, because it was in direct contravention of 1 Geo. 1, st. 2, c. 18, s. 14. (3) This statute deals with

(1) 24 & 25 Vict. c. 109, s. 4, enacts, inter alia, that "'dam' shall mean all weirs and other fixed obstructions used for the purpose of damming up water. 'Fishing weir' shall mean a dam used for the exclusive purpose of catching or facilitating the catching of fish. 'Fishing mill-dam' shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes."

(2) See 24 and 25 Vict. c. 109, s. 12.

(3) 1 Geo. 1. st. 2, c. 18, s. 14, "and whereas the several acts of parliament heretofore made for the preservation of fishing within the rivers of this realm have hitherto proved ineffectual in respect to the rivers Severn, &c., . . . Ribble, &c., ... for want of a due encouragement to be given to such persons who could discover the many illegal practices and abuses done therein;" and then enacts, "Wherefore . . . . for the better

particular rivers, and the Ribble is one of them. It prohibits the making of any dam which, in fact, obstructs the passage of salmon up the river. The illegality of a dam under this act does not depend upon the way in which the dam was used. The mere fact that the dam did obstruct the passage of the fish rendered it an illegal erection. The commissioners have found as facts, in paragraph 15, that this dam did hinder the fish from ascending the river, and that the dam was built since 1714, the date of the passing of the act of 1 Geo. 1. The dam, therefore, has been illegal from the date of its erection until 1861, when this portion of the act of 1 Geo. 1 was repealed by the Salmon Fishery Act, 1861, s. 39. The repeal of the act, however, does not render a dam legal which was illegal before such repeal. No prescriptive right to the dam could be gained by a user which was during its whole continuance in contravention of an act of parliament. For these reasons the dam was a fishing mill-dam in contravention of the Salmon Fishery Act, 1861, and the commissioners were right in ordering it to be rendered incapable of catching fish.

Mellish, Q.C. (*Jordan* with him for the appellants), was not called upon.

COCKBURN, C.J. It seems to me to be quite clear that the legislature, by the act of 1861, intended to provide for three kinds of obstructions which might be presented to the passing of salmon up rivers. These obstructions must be considered with reference to s. 4 of the act of 1861, which is the defining section, and which refers to three forms of obstruction, viz., dams, fishing weirs, and fishing mill-dams, and defines the meaning of these words: "'Dam' shall mean all weirs and other fixed obstructions used for the purpose of damming up water." "'Fishing weir' shall mean a dam used for

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securing the spawn, fry and breed of salmon in the said rivers, be it enacted . . . . that if any person or persons whatsoever shall at any time hereafter . . . . make, erect, or set any bank, dam, hedge or stank . . . . across the said rivers, or any part thereof, whereby the salmon therein may be taken or hindered from passing or going up the said rivers to spawn," he shall be liable to certain penalties; and the justices before whom the person so offending shall be convicted, "shall cause such banks, dams, hedges or stanks, made or erected across the said river, to be demolished and removed," &c.

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the exclusive purpose of catching, or facilitating the catching, of fish." "'Fishing mill-dam' shall mean a dam used, or intended to be used partly for the purpose of catching, or facilitating the catching, of fish, and partly for the purpose of supplying water for milling or other purposes."

It is over obstructions, thus defined, that the acts of 1861 and 1865 give the authority which has been exercised in this case. We find that these two statutes provide differently with regard to cases of dams and of the other kinds of obstruction. By s. 12 of the act of 1861, provision is made with regard to dams as distinguished from fishing weirs, and fishing mill-dams. This section enacts that "no dam, except such fishing weirs and fishing mill-dams as are lawfully in use at the time of the passing of this act, by virtue of a grant, or charter, or immemorial usage, shall be used for the purpose of catching, or facilitating the catching, of salmon." The section then imposes certain penalties upon any persons acting in contravention of its provisions, and goes on to provide for the cases of fishing weirs and fishing mill-dams.

When we come to s. 42 of the subsequent act of 1865, we find that the commissioners have authority only over fishing weirs and fishing mill-dams. They have power under this section to remove such fishing weirs, and to render incapable of catching fish such fishing mill-dams as are in contravention of the act of 1861. But their authority is limited to fishing weirs, and fishing mill-dams. Dams, as distinguished from the other two forms of obstruction, do not come within s. 42 of the act of 1865, although capable of being used for the purpose of catching, or of facilitating the catching of fish. We have, therefore, in this case simply to inquire whether the obstruction in question is a fishing mill-dam, or a dam, as it is clearly not a fishing-weir. This is rather a question of fact than of law. Fishing weirs are out of the question, as they are only such obstructions as are used singly and solely for the purpose of catching, or facilitating the catching of fish. Fishing mill-dams and dams may, I think, be thus distinguished: dams may be erected simply for the purpose of turning water. This may be done legitimately, so long as the rights of riparian owners are not interfered with. A dam so erected may, however, render it easy to take salmon which otherwise could not be taken. If so,

the case falls within s. 12 of the act of 1861, and any person availing himself of these facilities for the purpose of catching salmon becomes liable to the penalties imposed by that section. A fishing mill-dam I take to be a dam erected for the purpose of supplying water to a mill, and of enabling persons to catch fish. Whether it is erected for this double purpose, or is used for this double purpose, is the same. If intended to effect, or used to effect, this double purpose, it is a fishing mill-dam.

Now, what are the facts in this case? The dam in question was erected for the sole purpose of supplying the mill with water. The result of this is, that the water is reduced so low below the dam that salmon may be taken more easily than would be the case if there were no dam. The proprietor of the mill, availing himself of this facility, takes fish occasionally. He is thus liable to the penalties of s. 12 of the act of 1861, but he does not, therefore, lose his right to use the dam for his mill. He is not thereby put into the position of those who use a fishing mill-dam.

Mr. Hannen has ingeniously argued that, as the river Ribble is expressly mentioned in the statute 1 Geo. 1, st. 2, c. 18, any dam which had the effect of preventing salmon from passing up the river to spawn must be illegal, and that, therefore, this dam was always illegal up to the time of the passing of the act of 1861, and that, therefore, no right to it could be gained by user or prescription. I think, however, that a person might have a right to construct such a dam as this by consent of the riparian owners, although it might be in contravention of an act of parliament. He would have been liable to a penalty if the dam obstructed the fish, but still he might have a right to the dam as against other riparian owners. The way, however, to look at this question, is to see what would be the state of things if, after the repeal of 1 Geo. 1, st. 2, c. 18, the appellants, with the consent of the other riparian owners, erected a dam like this for his mill. The question then would be, was it put up or kept up for fishing, or for facilitating the catching of fish. The act of 1861 says, if the dam is used or intended to be used for catching fish, then it is a fishing mill-dam, and if so, then it is within the jurisdiction of the commissioners. This, however, seems not to apply to a case where the dam is erected honestly and bonâ fide for the purpose of

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supplying water to a mill, and not used or kept up for fishing. The dam in this case is therefore a mill-dam only; it can only be used in connection with the taking of fish incidentally, or it might almost be said accidentally, and it is therefore not within the definition of a fishing mill-dam, as given in the act of 1861. I think, therefore, our judgment must be for the appellants.

SHEE, J. I am of the same opinion. We have to decide whether the commissioners were right in their decision under the statutes of 1861 and 1865. In deciding this, we must look to s. 42 of the act of 1865, which gives the commissioners power to render fishing mill-dams which are in contravention of the act of 1861 incapable of catching fish. It is extremely reasonable, regard being had to the public object of the legislation upon this subject, that commissioners should have power summarily to abate obstructions in rivers intentionally and purposely devoted to the object of catching, or facilitating the catching of fish. But the legislature could never have intended to give so large a power to the commissioners, if it should merely be proved that the dam was used for this purpose only upon a few occasions. The commissioners are empowered to abate illegal fishing mill-dams, as defined in s. 4 of the act of 1861. The words of that section are: "Fishing mill-dam shall mean a dam used or intended to be used," &c. "Intended to be used" means something less than used —it means "constructed for the purpose of being used, although not used." "Used" means "in use," almost in the sense of "maintained partly for the purpose of using." This means something more than a mere occasional use; something more than the use described in the case. It is very reasonable that a dam erected colourably for the purpose of supplying a mill with water—that being to some extent the object of it—and yet effecting, or intending to effect, the catching of fish, should be liable to this summary jurisdiction of the commissioners. But it is not reasonable that such power should be given, when the facts are such as those of this case.

Another ground of Mr. Hannen's argument was, that the mischief which the acts of 1861 and 1865 were passed to remedy, would be unprovided for unless his contention were adopted. But that is

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not so. The mischief is provided for by s. 12 of the act of 1861. This, although not a fishing mill-dam, is yet a dam within s. 12, and under that section any person catching, or attempting to catch, salmon, in contravention of its provisions, is liable to the penalty therein mentioned, and any traps, &c., used by him are liable to be forfeited. The mischief, therefore, against which the acts have been passed, are sufficiently provided for by this section. Therefore, I am of opinion that the argument of Mr. Hannen ought not to prevail, and that the order of the commissioners was wrong.

LUSH, J. I think this dam might have been an illegal obstruction so long as 1 Geo. 1, st. 2, c. 18, remained in effect. That act provided, that any obstruction whereby the salmon may be hindered from passing or going up the rivers mentioned in that act to spawn, was illegal. This dam had that effect, and therefore any person erecting or keeping up this dam would have been liable under s. 14 of that act to a penalty, and liable also to have the dam demolished or removed. This section of the act was, however, repealed by s. 39 of the act of 1861. The power of abating obstructions given to the commissioners by the act of 1865 is confined to such fishing weirs and fishing mill-dams as are in contravention of the act of 1861. In order, therefore, to ascertain to what dams this power extends, we must look to the definition of fishing weirs, and of fishing mill-dams, in s. 4 of the act of 1861. The dam in this case is clearly not a fishing weir within that section. But is it a fishing mill-dam? [The learned Judge read the definition in the section.] Therefore, from the time of the passing of this act, which repealed the statute of 1 Geo. 1, st. 2, c. 18, a mill-dam is no longer liable to be demolished as such, because it does not fall within the description of dam which the commissioners have power to abate. A fishing mill-dam, by the definition of the act of 1861, means a dam which contains something in its construction which gives it a double character, and which makes it fit for the purpose of catching, or facilitating the catching of fish, over and above what is necessary for milling purposes. To the extent that it is calculated to serve this purpose, the commissioners have power to abate it. They have, however, no power to abate this dam, as it is only a mill-dam properly

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so called. This is clear from the facts stated in the case. It has incidentally the effect of facilitating the catching of fish, because there is not water enough for the fish to go over the dam, and they may be taken in the pools below. If, however, the fish are thus taken, s. 12 of the act of 1861 comes into operation. That section only uses the word "dam," which includes a dam such as the one in the present case. Salmon fisheries are, therefore, sufficiently protected. This section shews that the legislature assumed some dams were lawful, and only imposed a penalty upon their misuse. For these reasons I am of opinion that the commissioners have exceeded their powers, and that our judgment must be for the appellants.

Judgment for the appellants.

Attorneys for appellants: *Reed & Co., for Sale, Shipman, Seddon, & Sale, Manchester.*

Attorney for respondents: *Solicitor to the Treasury.*

Nov. 5.

TOLER AND OTHERS *v.* SLATER AND ANOTHER.

Lessor and Lessee—Husband and Wife—Indenture of Lease by Husband and Wife, without Acknowledgment, binding on Lessee.

Husband and wife seised in fee in right of the wife, in April, 1860, by indenture demised land to C. for seven years, and the lessee and the defendants, as his sureties, covenanted to pay the rent during the term. The deed was executed by all the parties, but the wife did not acknowledge it under 3 & 4 Wm. 4, c. 74, s. 79, nor was the deed in conformity with 19 & 20 Vict. c. 120, s. 32. The lessee entered immediately, and occupied till August, 1866, when he left England. The husband died in January, 1866; and the wife died in January, 1867, having interfered in no way with the property. The executors of the wife brought an action on the covenant against the defendants to recover rent which accrued due in June, 1866:—

Held, that the covenant bound the defendants, inasmuch as the lessors had executed the deed, so as to pass the term for which the lessee and the defendants must be taken to have contracted and to which the covenant was annexed, viz., a term for seven years, terminable at the option of the wife on the husband dying during the term; and that as the wife had done nothing to avoid the lease, but allowed the lessee to retain possession, the lease was subsisting up to her death, and the plaintiffs could therefore recover.

DECLARATION by the plaintiffs, as executors of Mary Hodges, deceased, on an indenture of lease by which Thomas Hodges and

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Mary his wife, seised in fee in right of the wife, demised certain land, &c., for a certain term to Peter Clarke, which indenture the defendants executed, and covenanted, as sureties for Clarke, to pay the rent, &c., claiming a year's rent, which became due after the death of Thomas, and during the life of the testatrix, who survived him.

Pleas: 1. That the deed was not the deed of the defendants.

2. That Thomas and Mary Hodges were not seised as alleged.

3. That Thomas and Mary Hodges did not demise as alleged.

4. That no rent became due from the defendants to Mary Hodges, as alleged.

Issue joined.

At the trial at the Cheshire summer assizes, before Kelly, C.B., it appeared that, on the 5th of April, 1860, Thomas Hodges and Mary, his wife, were seised in fee of certain land in right of the wife; and by an indenture of that date, without any recitals, but expressed to be between Thomas Hodges and Mary, his wife, of the first part, Peter Clarke of the second part, and the defendants of the third part, Thomas Hodges and Mary, his wife, in consideration of the rent and covenants, demised to Clarke, his executors, &c., certain land, &c., for the term of seven years, as to part from the 2nd of February then last, and as to the rest from the 2nd of May then next, yielding and paying, during the said term of seven years, the yearly rent of 180*l.*, upon the 24th of June in each year. And Clarke and the defendants, as his sureties, jointly and severally covenanted with Thomas Hodges and Mary, his wife, their heirs and assigns (inter alia), that they, or one of them, would pay to Thomas and Mary Hodges, their heirs and assigns, the said yearly rent.

The deed was executed by all the parties, but was not acknowledged by Mary Hodges, under 3 & 4 Wm. 4, c. 74, s. 79; nor was it in conformity with 19 & 20 Vict. c. 120, s. 32.

Clarke entered and occupied the demised premises from or before the date of the deed till August, 1866, when he left England. Thomas Hodges died in January, 1866; and the wife, in January, 1867, having interfered in no way with the premises.

The plaintiffs, as executors of the wife, sought to recover against the defendants, under the covenant in the deed, a year's rent, which accrued due on the 24th of June, 1866.

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The Chief Baron ruled that, as the lease was executed by the lessors, though not acknowledged by the wife, the defendants were bound by their covenant; and directed a verdict for the plaintiffs for the rent claimed.

Morgan Lloyd moved for a new trial, on the ground of misdirection. The lease being void as against the wife, the lessee and the defendants, who must be identified with him, are not bound by their covenants: *Pitman* v. *Woodbury* (1); *Swatman* v. *Ambler*. (2)

[LUSH, J. In those cases the lessors had not executed the lease, so that the term, the consideration for the payment, and to which the covenants were annexed, was never created.]

So here the wife, not having acknowledged the deed, her execution was of no operation to pass the term, and in effect there was no execution by the person whose estate was to be bound. At common law a married woman's estate could not be bound, except by means of a fine: but 32 Hen. 8, c. 28, s. 2, enabled a lease to be made during coverture binding the wife; that statute was repealed as to this by 19 & 20 Vict. c. 120, s. 35, and somewhat similar enactments (ss. 32—34) substituted; but the present lease was not in accordance with the requirements of the latter statute. The lease, therefore, not being acknowledged by the wife under 3 & 4 Wm. 4, c. 74, s. 79, did not bind her.

[LUSH, J. Is it not a fallacy to say that a lease by husband and wife is void against the wife? Is it not rather that it neither binds the wife absolutely, nor is absolutely void; is it not simply voidable at her election?]

A married woman's contracts are mere nullities: *Nicholl* v. *Jones*. (3) But whether the deed be void or voidable only, the case is within the principle of the two cases cited from the Exchequer: for the lessee and the defendants did not get what they contracted for, viz., an absolute indefeasible term for seven years; and those cases shew that it makes no difference that the intended lessee has actually occupied for the whole time.

[COCKBURN, C.J. There is nothing to shew that the parties con-

(1) 3 Ex. 4. (2) 8 Ex. 72; 22 L. J. (Ex.) 81.
(3) Law Rep. 3 Eq. 696.

templated anything more than a lease executed by the husband and wife; there is nothing said about acknowledgment.]

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The deed, it is true, contains no recitals; but it purports, on the face of it, to be by husband and wife, and it grants a term of seven years absolute; and, therefore, acknowledgment, in order to give validity to the execution by the wife, must have been contemplated just as much as the execution itself. Otherwise, why insert the wife as a party? A deed by husband alone would have had just as much validity. What the lessee got was at most a term defeasible, at the wife's option, in the event of her surviving, and terminable absolutely at her death as against her heir. In Woodfall's Landlord and Tenant, 8th ed. p. 44, it is said, a lease by husband and wife of the wife's freeholds, not in pursuance of either of the statutes, will, upon the wife's death, become void as against her heir-at-law.

[LUSH, J. That is, if the husband survive, and be not tenant by the courtesy. But here the wife survived.]

She did nothing to affirm the lease after her husband's death.

[COCKBURN, C.J. She allowed the tenant to remain in possession.

LUSH, J. In Bac. Ab. tit. Leases and terms for years (C), it is said: "It is clearly agreed that if a husband, seised of lands in right of his wife, make a lease thereof by indenture or deed poll, reserving rent, this is a good lease for the whole term, unless the wife, by some act after the husband's death, shews her dissent thereto."]

COCKBURN, C.J. I am of opinion that there should be no rule. I quite agree that if a man enters into a deed as lessee, under which he binds himself by covenants, he expects as the consideration that he shall have a valid lease granted to him in return; and the principle of the cases is perfectly good and intelligible which decide that, where the lessor does not execute the lease, the tenant, although he enters, does not get the consideration on which the covenants attach, viz., the grant of a term; and the tenant is not bound by the covenants, although he has executed the deed; and neither in such a case would the persons who entered into covenants as sureties for him be bound. But that is not the present case. Here the lessors did execute the lease; and though it is true the lease related to the land of the wife, there is nothing

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to shew that it was in the contemplation of the parties that the deed should be acknowledged under the statute by the wife, so as to make it conclusively binding upon the wife and her heirs in case of the husband's death during the seven years. There is nothing to shew that the parties intended more than a term of seven years, terminable at the option of the wife in the event of her surviving her husband. The parties, that is the lessee and the defendants as his sureties, were content to take a lease merely executed by the husband and wife at common law. In such a case if the wife confirmed it, after the death of the husband, then it would become a good lease absolutely binding upon her; and it would not be void, but only voidable on her doing some act to disaffirm it. In the present case the wife did no act to disaffirm the lease, neither did she do any positive act affirming it, but she allowed the tenant to continue in possession; therefore, it was a good and subsisting lease up to her death; and the rent which accrued due during her lifetime is recoverable by her executors. If it could be shewn that the parties contemplated an acknowledgment by the wife, there might possibly be some ground for saying that the covenantees had not the term they contracted for, and were therefore not bound by their covenants; but I can see nothing to shew that they expected more than the execution of the lease by the husband and wife. The present case, therefore, is not within the principle of the cases cited from the Court of Exchequer; consequently, I think the ruling of the Chief Baron was right, and the plaintiffs are entitled to keep their verdict, and there will be no rule.

LUSH, J. I entirely agree with the conclusion at which the Lord Chief Justice has arrived, and with his reasons. I cannot help adding, it would be a lamentable state of the law, if a person could be permitted to occupy and then refuse to be bound by his covenants to pay the rent, simply because the person whose land he occupied had power to turn him out but did not.

Rule refused (1).

Attorneys for defendants: *Litchfield & Burton, for Cooper, Congleton.*

(1) See *How* v. *Greek*, 3 H. & C. 391; 34 L. J. (Ex.) 4.

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Nov. 7.

BURKE *v.* THE DUBLIN TRUNK CONNECTING RAILWAY COMPANY.

MILLER'S CASE.

KERNAGHAN *v.* THE SAME COMPANY.

JAMES'S CASE.

MARLEY'S CASE.

Company—Scire facias against Shareholder—8 Vict. c. 16, s. 36—Payment to another Creditor—Practice—Execution without scire facias—Costs.

A rule nisi having been obtained by a judgment creditor of a company against a shareholder for a scire facias, under 8 Vict. c. 16, s. 36, on the application of the shareholder the Court made the rule absolute for execution without a scire facias.

It is sufficient answer to such a rule, that since the rule was obtained the shareholder has bonâ fide paid the full amount due on his shares to another creditor of the company who had obtained a scire facias against him; and it is not necessary that execution should have issued; and the Court discharged the rule without costs.

A creditor of a company obtained several rules at the same time against different shareholders, and before cause was shewn he obtained satisfaction of his judgment by payment from some of the shareholders; the Court thereupon discharged the rule against the other shareholder without costs.

THREE rules under 8 Vict. c. 16, s. 36, calling on holders of shares in the company, not paid up, to shew cause why writs of scire facias should not issue against them in order to enable the plaintiffs in the respective actions to obtain satisfaction, pro tanto, of their judgments against the company.

MILLER'S CASE.

Ledgard, in support of the rule.

Archibald for Miller, admitted that he had no cause to shew, but asked that the rule might be absolute, that execution should issue without a scire facias.

PER CURIAM (Cockburn, C.J., Mellor and Lush, JJ.). There is nothing in the statute requiring a scire facias. As the shareholder desires it, let the rule be absolute as prayed.

Rule absolute accordingly.

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JAMES'S CASE.

Joyce shewed cause, on affidavits, that after the rule had been obtained on the 10th of June, viz. on the 14th of June, a rule in the Court of Common Pleas was made absolute for a scire facias against James in an action by Rigby against the company, that the scire facias was issued, and the rule with the scire facias served on the 15th of June upon James's attorney, and the attorney thereupon paid to Rigby's attorneys 500*l.* being the whole amount payable on the shares held by James. He cited *Devereux* v. *Kilkenny &c. Railway Company* (1), to shew that it was discretionary in the Court to grant or refuse the writ, according as there was any disputed fact. Here there was no dispute that the shareholder had bonâ fide paid the other judgment creditor under pressure of legal proceedings.

Griffits, in support of the rule, contended that payment without execution was no answer. At all events the plaintiff was entitled to costs. He cited *Rigby* v. *Dublin &c. Railway Company*. (2)

COCKBURN, C.J. I am of opinion that this rule should be discharged. The case of *Devereux* v. *Kilkenny &c. Railway Company* (1), shews that it is discretionary with the Court whether they will issue a writ of scire facias. Here the facts are undisputed, viz. that a rule has been made absolute in the Court of Common Pleas, and a scire facias issued against the same shareholder at the suit of another creditor of the company, and the shareholder has paid the whole amount due on his shares to that creditor. If there were any doubt of the bonâ fides of the payment, I think it would be our duty to permit the writ to issue, in order that by proper pleading the question might be put in a way to be determined by the verdict of a jury. But there is nothing on the affidavits to impugn the honesty of the proceedings, and no suggestion of any fraud. The only question then is, whether when a creditor has taken proceedings against a shareholder to enforce payment of the judgment which he has obtained against the

(1) 5 Ex. 834; 20 L. J. (Ex.) 37. (2) Law Rep. 2 C. P. 586.

company, it can be no answer, on the part of the shareholder, to this application, that he has already paid the amount due from him on his shares to another creditor, unless that creditor has not only commenced proceedings against him but proceeded on the scire facias up to judgment and execution. That would be a monstrous proposition, and would merely put the shareholder to unnecessary expense. The rule must, therefore, be discharged.

MELLOR, J., concurred.

LUSH, J. I am of the same opinion. It may well be if the shareholder wished to be reimbursed (under s. 37) he must submit to execution before he pays; but it is clear that, if proceedings to enforce the creditor's judgment have been commenced against the shareholder, a bonâ fide payment by him under those proceedings, at whatever stage they may be, is a good answer against another creditor.

Rule discharged without costs.

MARLEY'S CASE.

Griffits, in support of the rule, admitted that since the rule was enlarged on the 17th of June, the plaintiff's judgment had been satisfied by payment, obtained under rules against other shareholders; but he asked that the rule might be discharged on the terms of payment of costs. The shareholder did not deny his liability, and therefore had no cause to shew when the rule was obtained against him.

Sir R. P. Collier, Q.C., shewed cause, and contended that, as it appeared on the affidavits that the company had assets in Ireland, the plaintiff was not entitled to the rule; the possibility of obtaining satisfaction in Ireland ought to have been negatived: *Devereux* v. *Kilkenny, &c. Railway Company*. (1) Secondly, the plaintiff having pursued this extraordinary remedy against several shareholders at once, he must pay costs to those whom he now admitted he had unnecessarily harassed.

(1) 5 Ex. 834; 20 L. J. (Ex.) 37.

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The Court (COCKBURN, C.J., MELLOR and LUSH, JJ.), without expressing any opinion as to what might have been their decision had ample assets been shewn in Ireland, refused to discharge the rule with costs on the first ground, as it was manifest on the affidavits that the debts of the company on judgments and mortgage were of such an amount as that the assets in Ireland were practically of no avail towards the present plaintiff's judgment. (1) But as the plaintiff had obtained satisfaction of his judgment by his proceedings against other shareholders, the Court discharged the rule without costs.

Rule discharged without costs.

Attorneys for Burke: *Wilson, Bristow, & Carpmael.*
Attorneys for Miller: *Hill, Son, & Heald.*
Attorneys for Kernaghan: *Hurford & Taylor.*
Attorneys for James: *Mayhew, Salmon, & Whiting.*
Attorney for Marley: *W. M. Wilkinson.*

Nov. 20.

THE QUEEN *v.* DAMARELL.

Bastardy Order—Absence of putative Father abroad—7 & 8 Vict. c. 101, *s.* 3.

By s. 3 of 7 & 8 Vict. c. 101, on proof that the summons in bastardy was left at the last place of abode of the person summoned six days at least before the sessions, jurisdiction is given to the justices to hear the mother's evidence, and, if satisfied with the corroborative evidence, to adjudge the man to be the putative father of the child; and therefore the order of affiliation is valid, although at the time it was made the man was in a foreign country, without notice of the proceedings.

RULE calling on the prosecutrix to shew cause why an order of certain justices of Cornwall, adjudging the defendant to be the putative father of a bastard child, born of the prosecutrix, &c., should not be quashed "for the insufficiency thereof;" the rule for the certiorari being in the same form.

It appeared from the affidavits that the summons was obtained on the 3rd of October, 1866, and served on the 4th of October,

(1) And as to this see *Rigby* v. *Dublin &c. Railway Company*, Law Rep. 2 C. P. 586.

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at a farm-house at Tetcott, where the defendant had been lodging for some years, by leaving it with the wife of the occupier of the house; the order was made on the 6th of December, in the absence of the defendant, on proof of such service. The order recited that the defendant "had been duly served with the summons, the summons having been proved to have been left at his last place of abode six days before," &c.

The defendant had left the house on the 1st of October, with the intention of going to America, and he sailed in a steamship from Plymouth on the 14th of October. The defendant made affidavit that he did not leave for the purpose of avoiding the summons, and that he first heard of the summons and order when he had been two months in America; and that he was not the father of the child, not having had connection with the mother for a year previous to the birth, which took place on the 29th of October. The prosecutrix made affidavit to the contrary, and that at the time she obtained the summons she believed the defendant to be still residing at Tetcott.

Griffits shewed cause. There is a preliminary objection that the rule for the certiorari does not comply with the 12 & 13 Vict. c. 45, s. 7, by stating the ground of the insufficiency: see Mellor J.'s judgment in *Reg* v. *Purdey*. (1)

[LUSH, J. The statute does not apply. The objection made when the rule was moved was not the insufficiency of the order on the face of it, but that, in fact, it was made without jurisdiction, owing to the absence of the defendant abroad.]

That objection is clearly untenable. Section 3 of 7 & 8 Vict. c. 101 (2) expressly gives jurisdiction to justices to hear the complaint on proof that the summons was left at the last place of

11 Jur. (N.S.) 153.

(1) 34 L. J. (M. C.) at p. 7.

(2) 7 & 8 Vict. c. 101, s. 3:—"After the birth of such bastard child, on the appearance of the person summoned, or on proof that the summons was duly served on such person, or left at his last place of abode six days at least before the petty session, the justices in such petty session *shall* hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other testimony, to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child;" &c.

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abode of the putative father. Indeed, the statute is imperative that the justices, on proof of the summons having been so left, "*shall* hear." It is for the justices to decide whether the service was proved to their satisfaction; but, if the Court will review their decision, the facts do not sustain the objection.

Kingdon, Q.C., in support of the rule. It is against justice that an order should be made in this way, binding on a man, which he has no power to get rid of: for, even if he be successful in an indictment for perjury against the mother, that will not get rid of the order. In *Reg.* v. *Davis* (1) the facts were precisely similar to the present, and Wightman, J., refused the certiorari to quash the order, only because the defendant did not negative that he was the father of the child. In the present case the defendant makes affidavit that he is not the father. The question is, whether an order made upon a person out of England without any notice or knowledge of the proceedings can be good. It is contrary to all justice that it should be. Service in Scotland, even, would not be good.

COCKBURN, C.J. I think we are bound by the words of the statute, which provides that on proof that the summons was left at the defendant's last place of abode six days at least before the petty sessions, the justices shall hear the evidence of the woman, and if it be corroborated, may adjudge the man to be the putative father. Proof, therefore, that the summons was left at the last place of abode is sufficient, without more, to give the justices jurisdiction. The defendant's counsel asks us to put a qualification upon that; but we cannot do so contrary to the express words of the statute. It is very true, that, when the defendant is in a foreign country, it is more or less inconsistent with justice that the order should be made upon him which he has no opportunity to appeal against. On the other hand, the operation of a contrary rule would be equally oppressive on the woman. By s. 2, she must apply within "twelve months after the birth of the child," and her remedy would be gone if the man were absent for a year; and she would have to bear the burden of the child's maintenance. The legislature would therefore appear to be in default in not making some provision by which the man might have the oppor-

(1) 22 L. J. (M. C.) 143.

tunity afforded him of getting a re-hearing upon shewing that the summons had never reached him, and that he had no opportunity of being heard in the first instance, provided that the present remedy to the mother were extended as to time when the man is abroad. In the absence of all such provisions we must abide by the words of the statute. All we have to inquire is, whether the summons was left at the last place of abode of the man. He left the house where he had been lodging for a long time for the express purpose of going to America, therefore he had no other place of abode, and that was his last place of abode.

MELLOR, J. I am of the same opinion; though I confess I have had some difficulty in reconciling it with a sense of justice—that a man is to be bound by an order made when he was abroad, and when he has had no notice of the proceedings. But at the same time we must look at the peculiar circumstances in which the parties are placed; and the only way of reconciling the difficulties on each side is to hold, that on proof of the summons having been left at the last place of abode the justices have jurisdiction to make the order; and the order is valid, although the man be abroad without notice at the time it is made.

LUSH, J. I am also of the same opinion. We have no jurisdiction to interfere and quash this order unless it has been illegally made. Now the statute expressly says, that on proof that the summons has been left at the last place of abode the justices *shall* hear the evidence of the woman and her witnesses, and if satisfied may make the order. There is no provision that they are to hold their hand if the man be out of the country. How can we interpolate so important an exception? The legislature having said what is to give the justices jurisdiction, and that being shewn in the present case, the order is valid.

Rule discharged.

Attorneys for defendant: *Coode, Kingdon, & Cotton, for Floud, Exeter.*

Attorneys for prosecutrix: *Vizard, Crowder, & Co.*

1867
Nov. 22.

IN THE MATTER OF AN INQUIRY BETWEEN EDWIN OWEN AND THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Inquiry as to Compensation under Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18)—*Taxation of Costs by Master under s.* 52—*Jurisdiction of Court of Queen's Bench to review.*

Where costs of an inquiry before the sheriff are "settled by one of the masters of the Court of Queen's Bench," under s. 52 of the Lands Clauses Consolidation Act, 1845, the Court has no jurisdiction over the master's taxation on a motion to review.

Quære, whether, if the master improperly allow costs to one of the parties where he is not entitled to them, or disallow them where the party is entitled to them, the Court can interfere by certiorari or mandamus.

RULE calling on the claimant to shew cause why the master should not review his taxation of costs, or why the allowance should not be set aside, on the ground that the claimant was not entitled to costs, and that the company were entitled to half the costs of the inquiry before the Sheriff of Lancaster and a compensation jury, under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18).

The company, on the 14th of January, 1865, gave notice of intention to summon a jury, offering 400*l.* for the claimant's interest in land which they were authorized by their act to take; a jury was duly summoned, and on the 25th of May notice of trial given for the 13th of June. On the 9th of June the claimant proposed to accept the company's offer of 400*l.*, which they then refused to give. The inquiry on the 13th of June proceeded, and the jury returned a verdict for 350*l.* The master taxed the claimant his costs under ss. 51, 52.

J. S. Day shewed cause. There is a preliminary objection, that the Court has no jurisdiction to review the master's taxation. This matter is referred, by 8 Vict. c. 18, s. 52 (1), to the master of

(1) 8 Vict. c. 18, s. 52:—"The costs of any such inquiry shall, in case of difference, be settled by one of the masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges, and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry."

the court, not as an officer of the court, but as a persona designata, with the powers of an original arbitrator, as was expressly decided by Erle, J., in the Bail Court, in *Ross* v. *York, Newcastle and Berwick Railway Company*. (1) In that case the learned judge said: (2) "It appears to me that the objection must prevail, and that the principle in *Morgan* v. *Smith* (3), applies. When the Court refers taxation to its officer, it has the power of reviewing, because the power of the officer is delegated to him by the Court, and his act is not effective unless adopted by the Court. The taxation in question was made without any delegation of power from the Court, and without any express or implied liability to review. Where the legislature intended the Court to have control over the taxation it has directed such court to award costs: see s. 80 as to costs of deposit, and s. 83 as to costs of conveyance, and s. 126, as to the costs of litigating a title."

[LUSH, J. What was the question there?]

Whether the claimant was entitled to any costs, the master having refused to allow them—the converse of the present case, it was not a question of quantum.

[LUSH, J. Suppose the master to have allowed costs to one of the parties where the statute does not give them, or disallowed them where the statute gives them, could not this Court interfere by certiorari or mandamus?]

Possibly: as it does in the case of any other public officer; but the Court has no original jurisdiction over costs so as to be able to review the master's taxation on motion. The jurisdiction is given by the statute to a master, not to the Court; and this was the very point decided by Erle, J., in the Bail Court. It is true, the learned judge, when Chief Justice of the Common Pleas, seems to have changed his view of the matter; and in *Metropolitan Railway Company* v. *Turnham* (4), to have inclined to the opinion that the Court had power to review the master's taxation. This change in the view of the learned Chief Justice appears to have originated in some subsequent case, supposed by him to have been decided in this court in Lord Denman's time; but no

(1) 5 D. & L. 695; 18 L. J. (Q.B.) 199.

(2) 5 D. & L. at p. 699.

(3) 9 M. & W. 427.

(4) 14 C. B. (N.S.) 212, 223; 32 L. J. (M.C.) 249, 252.

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trace of such a case can be found. No doubt this Court has reviewed the master's taxation in several cases: such as *Hayward* v. *Metropolitan Railway Company* (1); *Balls* v. *Metropolitan Board of Works* (2); and *Cobb* v. *Mid Wales Railway Company* (3); but in none of those cases was the point raised. In each, the parties either expressly agreed to, or tacitly acquiesced in, the jurisdiction of the Court; and in the case in the Common Pleas the point was unnecessary for the decision of the case.

[LUSH, J., referred to *Tennant* v. *Borough of Belfast* (4), and *Scully* v. *Great Southern and Western Railway Company* (5); in the first of which the Irish Court of Queen's Bench refused, on motion, to review the master's taxation under s. 52, and in the other refused a rule for a mandamus to the master.]

In addition to those cases, the case of *Ross* v. *York, Newcastle and Berwick Railway Company* (6), was expressly affirmed by the Court of Exchequer in *Re Sheffield Waterworks Act.* (7) That was an à fortiori case in favour of the power of the Court to interfere; for there the payment of costs by the special statute were to be enforced as a judgment, and the costs were to be taxed on the same principle as costs in an action of law (8); whereas there is nothing said in s. 52 as to the principle of taxation, and by s. 53 the costs are to be enforced, not as a judgment, but by distress.

[LUSH, J. By the original statute (s. 34), if the compensation is settled by arbitration, the arbitrators are to settle the costs; the Court could not in such a case interfere. By the statute of last session (30 & 31 Vict. c. 127, s. 37), the costs in an arbitration may be settled, on the application of either party, by one of the masters of the Queen's Bench. It can hardly be said that the legislature, by this, intended to give the Court jurisdiction where it had none before.]

Littler, in support of the rule. The balance of authority, at all events, is in favour of the jurisdiction of the Court to review. In *Re Sheffield Waterworks Act* (7), *Ross* v. *York, Newcastle and*

(1) 4 B. & S. 787; 33 L. J. (Q.B.) 73. 10 Jur. N.S. 418
(2) Law Rep. 1 Q. B. 337. 12 Jur. N.S. 199.
(3) Law Rep. 1 Q. B. 342. 12 Jur. N.S. 522
(4) 11 Ir. Law Rep. 290.
(5) 11 Ir. Law Rep. 292.
(6) 5 D. & L. 695; 18 L. J. (Q.B.)
(7) Law Rep. 1 Ex. 54.
(8) See Law Rep. 1 Ex. at p. 55.

Berwick Railway Company (1), was cited as an unquestioned authority; and *Metropolitan Railway Company* v. *Turnham* (2), was not brought to the notice of the Court. There is, moreover, a distinction in the two statutes. In the Lands Clauses Act, the costs are to be settled by a master of the Queen's Bench; whereas, in the Sheffield Act, the duty is cast on the masters of all the courts; so that no court can be said to have jurisdiction more than another; and this appears to have been the ground of Bramwell B.'s judgment. The reasons given by Erle, C.J., in *Metropolitan Railway Company* v. *Turnham* (3), for changing his opinion, are much more cogent than the reasons which the learned judge gave for that opinion in the Bail Court. He points out that the master is an officer of the court, with certain well known functions, and whose decision is subject to the well known incident of review by the Court; and, therefore, he must be taken to be subject to review in this case, although it is true that he is, in this particular duty, deputed by parliament, and not by the Court. Willes, J., also says that it is highly probable, looking at s. 36, which provides that the submission to arbitration may be made a rule of court, the intention of the legislature may not have been to make the master an independent judge; though the learned judge says he should hesitate before overruling the case in the Bail Court. Byles, J., is very strong in favour of the jurisdiction of the Court. He agrees with the Chief Justice, that "unless the legislature expressly enact the contrary, whenever a matter is referred to one of the masters, it is so referred subject to the control of the court of which he is an officer." And Keating, J., says:—"The only court of appeal from the decision of a master is the court of which he is an officer." That case, therefore, ought to outweigh the case in the Exchequer, which is on another and not altogether analogous statute. It never could have been intended that the decision of the master should be final. It is not strictly accurate to say the decision of an arbitrator as to costs could not be reviewed, for this was done in *Yates* v. *Mayor of Blackburn*. (4)

(1) 5 D. & L. 695; 18 L. J. (Q.B.) 199.

(2) 14 C. B. (N.S.) 212; 32 L. J. (M.C.) 249.

(3) 14 C. B. (N.S.) at p. 223; 32 L. J. (M.C.) at p. 252.

(4) 6 H. & N. 61; 29 L. J. (Ex.) 447.

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[LUSH, J. That was not an application to set aside an arbitrator's award as to costs, but an action on an award, to which the defendant had pleaded that the plaintiff was not entitled to costs.]

But it shews there is a mode of reviewing the arbitrator's decision.

[LUSH, J. So here it is admitted that there may possibly be a mode of reviewing the master's decision; but it is said the present is not the mode.

COCKBURN, C.J. As at present advised, I am by no means prepared to say that the Court might not interfere by mandamus or certiorari.]

In *Scully* v. *Great Southern and Western Railway Company* (1), the Irish Court of Queen's Bench decided that a mandamus could not go to the master, an officer of their own court.

[COCKBURN, C.J. Possibly not; but there is still the remedy by certiorari. On the present question, however, which is all that is before us, I cannot help thinking that there is strong ground for the position taken by Erle, J., in the Bail Court, that the power to review a master's taxation of costs arises from the fact that the authority is delegated to him from the Court; that he is doing what the Court, strictly speaking, must do itself. That is not so where the statute gives the master direct authority.]

The decision of Erle, J., is based partly on a comparison of other sections of the statute. But this comparison scarcely bears out the reasoning. In the cases provided for by s. 80, there are various costs incurred, over which it may well be the Court of Chancery should exercise a superintending power; the same may be said of s. 83; and s. 126, which is the last referred to by the learned judge, contemplates the case of actual litigation in the court of Chancery, over which it was a matter of course that the Court, and not the master, should have the superintending power. But those cases are very different from the simple case of costs incurred before an independent tribunal, like the sheriff, which has no officer of its own to whom to commit the taxation of costs.

[LUSH, J. In the present case, the objection is as to the right

(1) 11 Ir. Law Rep. 292.

to any costs at all, not as to the quantum allowed; but if the Court can review in one case, it can in the other. Where is there any power given by the statute to regulate the scale of costs?]

The ground of Erle C.J.'s judgment in the Common Pleas answers that; the very fact that the master's decision is subject to review is the reason he is selected as the person to tax the costs.

COCKBURN, C.J. I think the rule must be discharged, on the ground that this Court has no jurisdiction to interfere with the matter of this taxation.

The authorities are divided. There is, in the first place, the authority of Erle, J., when a member of this Court, in the case of *Ross* v. *York, Newcastle and Berwick Railway Company.* (1) But it seems that that learned judge, either before or since his elevation to the chief justiceship of the Common Pleas, changed his view on the subject, and the majority of the Court of Common Pleas appear to have been of opinion, in *Metropolitan Railway Company* v. *Turnham* (2), that the Court had authority over one of its masters on taxation under this act of parliament. But Willes, J., seems not to have been prepared to go the length of adopting that view at once. On the other hand, the Court of Exchequer, in *Re Sheffield Waterworks Act* (3), on their construction of a statute that appears to me to be analogous in all respects, and where the decision rested on the same principle, took the opposite view. The same question arose before the Court of Queen's Bench in Ireland, in *Tennant* v. *Borough of Belfast* (4), and they held that they had not jurisdiction on a motion of this sort to interfere with the taxation of the master. Therefore, the authorities are divided, and we must exercise our own judgment.

I must say that my mind arrives at the same conclusion, and much on the same grounds, as Erle, J., in the first of these cases, the case of *Ross* v. *York, Newcastle and Berwick Railway Company* (1); though I own I feel the force of Mr. Littler's argument, when he pressed upon us that it is unfortunate that there should

(1) 5 D. & L. 695; 18 L. J. (Q.B.) 199.
(2) 14 C. B. (N.S.) 212; 32 L. J. (M.C.) 249.
(3) Law Rep. 1 Ex. 54.
(4) 11 Ir. Law Rep. 290.

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be no power in the Court, except possibly in proceedings by certiorari, to set a taxation right, if the master, in the exercise of his judgment, should have proceeded on a wrong principle; but we cannot, because it might have been desirable that the legislature should have given the Court authority to interfere in such a matter, assume that authority when the legislature has not given it. Now I think that the only ground on which we can ever exercise jurisdiction in a matter of taxation is this, that the office of taxing costs to the successful party entitled is the business of the Court itself. It would be extremely inconvenient if the time of the Court were to be occupied in a matter of this kind; and we are provided with officers who, as the delegated officers of the Court for that purpose, assist us by going through these proceedings: and the Court has necessarily jurisdiction to control this delegated authority, in the event of there being anything which the Court may think wrong in its exercise. But where the legislature thinks proper to give the power of taxation, and imposes the duty of taxation, not on the Court, but simply on one of the officers of the Court, without in any way rendering it necessary that the Court should interfere, it seems to me a case in which we have not any authority over the master. I agree with what Erle, J., said in the Bail Court, that the office performed by the master has reference to the causes in the court, and is part of the necessary and incidental proceedings of the Court, and that, therefore, the Court had jurisdiction over it. That does not apply to the case now before us, in which the authority is derived, not from the Court itself, but from the act of the legislature in giving the power to the master and imposing the duty on him. I agree with the view taken by Erle, J., in the first case, and the Court of Exchequer in the last case, and the Court of Queen's Bench in Ireland, on this identical question.

If, indeed, in imposing this duty, and giving this authority to the master of the court to tax in such a case as the present, the legislature had used the language which is used in the 83rd section of the Act (1) with reference to costs on a conveyance,

(1) 8 Vict. c. 18, s. 83:—"If the promoters of the undertaking and the party entitled to any such costs shall not agree as to the amount thereof, such costs shall be taxed by one of the taxing masters of the Court of Chan-

and had said that the costs should be taxed upon an order of the Court, I should have thought that was quite sufficient to give the Court jurisdiction to control the exercise of the discretion of the master of the court. That would go plainly to shew that it was intended that the Court should intervene, and that the acts of the master should be subject to the authority of the Court as flowing from it. But in the 52nd section, by which the masters of this court are appointed to tax the costs arising from a litigation between claimants and the promoters of railway and other companies, no such language is used; and the authority is given simply, and without more, to one of the masters of the court. I do not think, under those circumstances, that the Court has authority to control the exercise of the master's discretion, although I think it would have been better if the legislature had thought proper to use the same language, with respect to the master of this court, as it used with respect to the masters of the court of Chancery. It has not done that; and, therefore, I think the rule ought to be discharged.

SHEE, J. I am of the same opinion. I think the 52nd section of the Lands Clauses Consolidation Act, and the 83rd section, must be construed together, at least the provisions of the 52nd section must be construed with reference to what is provided in the 83rd section. Now, in the 83rd section, as respects the costs of conveyance, it is provided:—[The learned judge read the section]. In that section jurisdiction is clearly given as to the taxation of costs to the Court, if necessary, over its masters, and it is expressly provided that the costs certified by the master to be due for a conveyance shall be recovered in the same way as other costs certified by the master in the court of Chancery under an order of the

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cery, or by a Master in Chancery in Ireland, upon an order of the same Court, to be obtained upon petition in a summary way by either of the parties; and the promoters of the undertaking shall pay what the said master shall certify to be due in respect of such costs to the party entitled thereto, or, in default thereof, the same may be recovered in the same way as any other costs payable under an order of the said Court, or the same may be recovered by distress in the manner hereinbefore provided in other cases of costs;" &c.

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court are recoverable. But in the 52nd section nothing of the kind is provided. It is provided simply, that the costs of an inquiry before a jury shall be settled by one of the masters of the Court of Queen's Bench of England or Ireland, on the application of either party; and then it goes on to say:—"And such costs shall include all reasonable costs, charges, and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, &c." Now in this section there is no reference to the court of which the master is an officer, except by way of designating the person who is to settle, in case of difference, the amount of costs. It seems to me probable that the legislature, knowing well that the costs of these inquiries before a jury in the matters to which this section applies, are costs reasonably taxable upon a different principle, and upon a more liberal scale than between party and party in an ordinary suit, has selected the master of the Court of Queen's Bench as a person, probably above all others, competent to take a reasonable view of what the costs, in this exceptional description of business, as to the attendance of witnesses, and employment of counsel, should be. Then, in the 53rd section, there is a provision for the recovery of the costs, and that provision seems to me of a nature to shew that the legislature intended that the taxation of the costs, in case of inquiry before a jury, should be in the absolute discretion of the master; because it provides that where any such costs shall be payable by the promoters of an undertaking, and if within seven days after demand such costs be not paid to the party entitled to receive the same, they shall be recoverable by distress, and, on application, any justice shall issue a warrant accordingly. Now, it is true that the same words occur in the 83rd section. After providing that the costs shall be recoverable in the same manner as under an order of the said Court in other cases, that section goes on to provide, "or the same may be recovered by distress in manner hereinbefore provided in other cases of costs;" that is as in the 53rd section. But the 83rd section, in the earlier part of it, provides that the taxation shall only take place on an order of the same Court, which gives the Court jurisdiction to review anything that may be thought to have been done amiss by the master. There is nothing of that kind in s. 52.

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On the whole, therefore, I am of opinion with the Lord Chief Justice, that the view taken of this section in *Ross* v. *York, Newcastle, and Berwick Railway Company* (1), and by the Irish Court, in *Tennant* v. *Borough of Belfast* (2), is the right view; and that the master is invested, by s. 52, with the character and authority of an original arbitrator, from whose decision there is no appeal.

LUSH, J. I am of the same opinion. It is clear to me that we have no jurisdiction to interfere in this taxation, unless jurisdiction is given us by the Lands Clauses Consolidation Act: because there are no proceedings in this court out of which the taxation arises. The warrant for the summoning of a jury does not issue from this court. There is no jury process from this court, nor is the judgment on the inquisition signed in this court. This court has nothing whatever to do with any of the proceedings from beginning to end. Now, there being no proceedings in this court which give us jurisdiction over taxation, we must find jurisdiction given to us by the language of the statute. Upon looking carefully at the clauses, I cannot find a single word which manifests the intention of the legislature to clothe us with such power. If it had been intended that the taxation of the costs should be in the power of the Court, I should have expected to find these sections giving it to the Court, or there would have been some words giving the Court a controlling power over the exercise of that jurisdiction. There is nothing of the kind. The 52nd section merely directs that the costs of the inquiry, in case of difference, shall be settled by one of the masters of the Court of Queen's Bench. That is a designation of a person, not as an officer of the Court, subject to the control and regulations of the Court to which he belongs, but because he is a person conversant with the taxation of costs, and is versed in the taxation of costs; and it therefore gives no power to the Court.

MELLOR, J. I have taken no part in the judgment, because I have an interest in the matter; but I think I may venture to say,

(1) 5 D. & L. 695; 18 L. J. (Q. B.) 199. (2) 11 Ir. Law Rep. 290.

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that, having heard the arguments and the opinion of the Court, I entirely concur in it.

Rule discharged without costs.

Attorneys for claimant: *Denton & Hall, for Steble & Jameson, Liverpool.*

Attorney for company: *J. B. Batten.*

Nov. 25.

THE QUEEN *v.* PRATT.

Highway—Conviction for riding or driving over Footpath, under Highway Act, 5 & 6 Wm. 4, c. 50, s. 72.

Section 72, of the Highway Act, 5 & 6 Wm. 4, c. 50, imposes a penalty on any person, "who shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot-passengers, or shall wilfully drive any horse, &c., cattle or carriage, upon any such footpath or causeway":—

Held, that the enactment applies only to footpaths (as well as causeways) by the side of roads, and not to footways in general.

RULE calling on the prosecutor to shew cause why a conviction of two justices of the borough of Aldeburgh, in the county of Suffolk, whereby the defendant, Richard Pratt, was convicted, for that he did unlawfully and wilfully drive a carriage and two horses along a certain public footpath in the said borough, called "Craig path," contrary to the statute (5 & 6 Wm. 4, c. 50, s. 72), should not be quashed for the insufficiency thereof.

It appeared from the affidavits that the "Craig path," over which the defendant was convicted of driving, was an open path or road along the sea beach, and was not a footpath (nor a causeway) by the side of a carriage road, but was either merely a public path for foot-passengers, as the prosecutor contended before the justices, or as the defendant contended, a public way for carriages as well.

The rule was obtained on the ground that s. 72, of 5 & 6 Wm. 4, c. 50 (1), did not extend to such a footpath, and consequently the conviction was without jurisdiction.

(1) 5 & 6 Wm. 4, c. 50, s. 72:—"If any person shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot-passengers; or shall wilfully lead or drive any

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Keane, Q.C., and *Metcalfe*, shewed cause, and contended that the section applied to any footpath, and that the words, "by the side of any road set apart for the use of foot-passengers," were to be confined to a causeway only. There was just as much necessity to protect a footway, whether by the side of a carriage-road or not; the danger to foot-passengers was the same in either case.

Hayes, Serjt., in support of the rule, was not heard.

COCKBURN, C.J. The question turns upon the construction to be put on the first part of s. 72 of 5 & 6 Wm. 4, c. 50; and it appears to me very clear that the construction to be put upon it is, that it only extends to a footpath set apart for the use of foot-passengers by the side of a road. The highway in question does not come within the section so understood, as it is not a footpath by the side of a road; for it must be taken to be a footpath only, that is a highway for foot-passengers only, no part being a road or highway for carriages. It was argued that we ought to distinguish between "pathway" and "causeway," that the first word was used generally, and that it was only in the case of a causeway that it was necessary that it should be by the side of a road in order to bring it within the section. If that had been the intention of the legislature, the sentence would have run "upon any footpath, or *any* causeway set apart for the use of foot-passengers by the side of any road." It may be that it is subject of regret that there is no summary means of protecting such a footpath as the present; but it never could have been intended to make it an offence to drive over any footway. Footways often pass entirely through grass land, and it would be an extreme hardship on the owners of the land if this enactment applied to such footways. It was intended to prevent persons who drive or ride along a road from riding or driving over the footpaths by the side of the road, and so damaging the path and endangering the safety of the foot-passengers; and this part of s. 72 is a most useful enactment, giving a summary mode of punishment for such wanton mis-

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horse, ass, sheep, mule, swine, or cattle, or carriage of any description, or any truck or sledge upon any such footpath or causeway;" . . . . every such person so offending shall forfeit a sum not exceeding 40*s*.

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conduct; and as footpaths may be, and often are, level with the road, it was necessary to insert "footpath" as well as "causeway."

MELLOR, J. I am of the same opinion. It is clear what the object of this enactment was: it was intended not to protect footpaths simpliciter, but only footpaths or causeways by the side of a road.

SHEE, J., concurred.

LUSH, J. I am also of the same opinion. I was a good deal struck with the argument, and thought at first the enactment might apply to footpaths other than those by the side of roads. But, on looking further into the section, I have come clearly to the conclusion that it can only apply to a footpath by the side of a road. By s. 5, a "highway" is defined to include "footways" and "causeways;" but there may be a footpath by the side of a road which is not a causeway, and therefore it was necessary to put in the 72nd section the word "footpath." The section makes it an offence to drive cattle over "any *such* footpath or causeway;" and cattle are constantly put in fields through which footpaths pass, and this section, therefore, never could be meant to apply to footpaths in general. It clearly applies only to those footpaths which run along the side of a high road; and the intention was to confine those persons who are riding or driving to that part of the highway which is "road" and not set apart for foot-passengers.

Rule absolute.

Attorney for prosecutor: *J. R. Wood.*
Attorney for defendant: *Southee.*

[IN THE EXCHEQUER CHAMBER.]

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Nov. 27.

FOSTER *v.* DODD AND ANOTHER.

Burial Acts, 20 & 21 *Vict. c.* 81, *s.* 23; 22 *Vict. c.* 1, *s.* 1—*Order in Council as to Burial Ground—Burial Ground unused at the time—Invalid Order no protection.*

The 20 & 21 Vict. c. 81, s. 23, enacts that it shall be lawful for the Queen in council, from time to time, to order such acts to be done by and under the directions of the churchwardens, or such other person as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health :—

Held, that the section applies, and the authority of the Queen in council can be exercised, only where an existing burial ground is under the care of churchwardens, or other persons who have the charge of it, for the purpose of the burial of the dead.

From the year 1679 till 1844, land was held by a corporation, from time to time, under long leases as a burial ground, and afterwards from year to year, till 1855. No burials took place after 1844, and in 1854 an order in council, under 15 & 16 Vict. c. 85, s. 2, was made that burials should be discontinued. In 1857, the freeholder demised the ground for ninety-nine years to S., who entered and put some rubbish on the land; in 1859, S. demised to the plaintiff for fifty years, and he entered on the land. In the same year, an order in council was made under 20 & 21 Vict. c. 81, s. 23, directed to "the person having the care of the burial ground," and served on the plaintiff, to do certain acts. The plaintiff disregarded the order, and thereupon the Secretary of State made an order, under 22 Vict. c. 1, s. 1, on the churchwardens of the parish in which the ground was situate, to do the acts: the churchwardens having entered in pursuance of the order :—

Held, that the sections did not apply, and that the orders were invalid, and the churchwardens therefore liable as trespassers.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiff on a special case. (1)

Declaration for trespass to land.

Plea, not guilty by statute (7 Jac. 1, c. 5; 21 Jac. 1, c. 12, s. 3.)

The defendants were the churchwardens of the parish of St. Bride, and the trespasses complained of were certain acts done by them in obedience to the order of the Secretary of State, under the Burial Acts, 20 & 21 Vict. c. 81, s. 23, and 22 Vict. c. 1, s. 1. (2)

(1) Law Rep. 1 Q. B. 475.

(2) 20 & 21 Vict. c. 81, s. 23, enacts that "It shall be lawful for her Majesty upon the representation of one of her Majesty's principal secretaries of state, by and with the advice

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The facts are fully set out in the report of the case in the court below (1), and they sufficiently appear from the judgment of Kelly, C.B.

The Court of Queen's Bench gave judgment for the plaintiff, holding that s. 23 of 20 & 21 Vict. c. 81, applied only to those places of burial which are consecrated and conveyed irrevocably for the purposes of burial, or which were in the care of persons as places of burial at the time the act passed; that the orders were therefore invalid, and the defendants liable as trespassers.

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of her Privy Council, from time to time, to order such acts to be done by or under the directions of the churchwardens, or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health; and every such order in council shall be published in the *London Gazette*, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof, shall be paid out of the poor rates of the parish: Provided always that no such representation shall be made until ten days' previous notice of the intention to make such representation shall have been given to the churchwardens or other persons or one of the churchwardens or other persons having the care of the vaults or places of burial to which the representation relates."

22 Vict. c. 1, s. 1, after reciting s. 23 of 20 & 21 Vict. c. 81, "and that it is expedient to amend the said enactment," enacts that, "where it appears to one of her Majesty's principal secretaries of state, on the representation of any person authorized by him to inspect any vaults or place of burial in relation to which an order in council has been or shall have been issued under the said recited enactment, that any acts, which by such order in council are ordered to be done by or under the direction of persons other than churchwardens having the care of such vaults or place of burial, are not done or performed within a reasonable time, and according to the intent of such order in council, it shall be lawful for such secretary of state by writing under his hand, to authorize and direct the churchwardens of the parish in which such vaults or place of burial may be situate, forthwith to do or complete the acts in such order in council mentioned, or such of them as remain undone, and such order of the secretary of state shall be obeyed by such churchwardens, and they and all persons acting under their direction, shall have the same power of entering and doing all such acts upon the premises to which the order in council relates, as if the said acts had by the order in council been directed to be done by such churchwardens, and such vaults or place of burial had been under their care; and any person who shall obstruct such churchwardens, or any others acting under their direction in relation to the premises, or remove or interfere with the works done by such churchwardens, shall be guilty of a misdemeanour."

(1) Law Rep. 1 Q. B. 475. 12 Jur. (N.S.) 466

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May 15th. *Brown, Q.C.* (*G. R. Clarke* with him), for the defendants (the plaintiffs in error). The first question is, whether the orders under which the defendants acted are valid. Section 23 of 20 & 21 Vict. c. 81, empowers the Queen in council, upon the representation of one of the principal secretaries of state, to order certain acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing their becoming or continuing dangerous or injurious to the public health; and by 22 Vict. c. 1, s. 1, in the event of an order made on a person other than a churchwarden not being complied with, the Secretary of State may order the churchwardens to do the acts mentioned in the order in council. The proceedings by the Secretary of State under these sections are not inter partes, but are in the nature of proceedings in rem, and therefore binding on all parties. It will be contended, on the other side, that s. 23 does not apply to private burial grounds, in which burials have ceased and which are not in the care of persons as places of burial. The object of the legislature in passing the burial acts has been the protection of the public health. By s. 30 of 20 & 21 Vict. c. 81, the 15 & 16 Vict. c. 85, and the 20 & 21 Vict. c. 81, are to be read as one act. And so reading the statutes, it is clear that the jurisdiction of the Queen in council extends to private burial grounds in the possession of the freeholder, and that whether burials have ceased in them or not. The 15 & 16 Vict. c. 85, by ss. 1—4 for the preservation of the public health, confers on the Queen in council in the largest language the most ample powers to order the discontinuance of burials. Under these sections an order may be made to discontinue burials in grounds consecrated or unconsecrated, public or private, and in so doing vested interests may be interfered with. A private burial ground may be ordered to be closed, and the whole of the income derived by the owner cut off; the ground then would be worthless to the proprietor. The legislature seems to have acted on the legal maxim, salus populi suprema lex, and made all private considerations yield to the public good. But it was not enough for the preservation of the public health that burials should be discontinued; a burial place in which burials had ceased might still become injurious to the public health, and therefore

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the legislature conferred further powers on the Privy Council. These additional powers are given by s. 23 of 20 & 21 Vict. c. 81, and that section ought to be construed largely to meet the mischief intended to be remedied, for a vault or place of burial belonging to a freeholder, though burials have ceased in it, may be as great a nuisance and quite as injurious to public health as a place of burial belonging to the parish. The words of s. 23 are "vaults or places of burial." A vault might belong to a freeholder, and burials may have not taken place in it for thirty years; still, if it become a nuisance and injurious to public health, could it be said that the Privy Council have no jurisdiction under this section to order the nuisance to be abated? Section 25 may assist in putting a construction on the words "place of burial." That section prevents the removal of bodies from "any place of burial" without a licence from the Secretary of State; to prevent the mischief intended to be prohibited; "place of burial" there must mean burial ground in which burials have ceased; and so, to carry out the intention of the legislature and prevent places of burial from becoming nuisances, "place of burial" in s. 23 ought to be construed to mean all places of burial, whether burials have ceased in them or not.

Secondly. The order is a protection to the defendants. It is good on the face of it. The defendants being ministerial officers, obeying an order made by a competent authority, are protected against any acts done under it, unless the order be illegal on its face: *Andrews* v. *Marris* (1); *Dews* v. *Riley*. (2) A sheriff is not liable to an action for obeying an order of a superior court; it would be presumptuous in him to doubt its validity; he is bound to obey the command of the court. The action must be brought against the person who sets the law in motion. Here, the churchwardens are ministerial officers, and are bound to obey the order of the Privy Council; they have no means of ascertaining its validity, or whether the Privy Council have jurisdiction to make it.

Mellish, Q.C. (*Horace Lloyd* with him), for the plaintiff. The judgment of the Court below ought to be affirmed. Section 23 only applies to a closed burial ground in the care of some person as a burial ground, and has no application to ground which, though it has once been a burial ground, is in the possession of a private per-

(1) 1 Q. B. 3. (2) 20 L. J. (C. P.) 264; 11 C. B. 434.

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son, as owner, who can use it for any purpose he pleases. If land be appropriated for ever as a burial ground and conveyed to trustees, so that it never could be used for any other purpose, it is obvious, if it were ordered to be closed, no profit could be made out of it, and it would become neglected; in that case, power is given to the Queen in council to make an order directing those who have the care of it to do such acts as would prevent its becoming a nuisance and injurious to the public health; but if land which has been used for burials is private property, subject to no trust, so that the owner can build upon it or apply it to any other profitable purpose, he naturally will keep it in a state which would prevent its becoming injurious to the public health; and there is no necessity for legislative interference. In the present case the land has never at any time been in the hands of any one who could be compelled to keep it as a burial ground. The governors of Bridewell only had the land on short leases, and in these leases covenanted with the freeholder to surrender the land at the end of the term. The freeholder never entered into a contract that he would keep the land as a burial ground.

[BYLES, J. So that the freeholder might dig up the bodies buried there?]

That would be a nuisance at common law. However, there is no contract between Lord De la Warr, and the relatives of the persons interred, that this ground should be for ever preserved as a burial ground. At the time the act passed, and the order was made, the land was Lord De la Warr's absolute property, and the effect of the order is to deprive a man of his property without any compensation whatever. The words of s. 23 are "churchwardens or such other persons as may have the care of any vaults or places of burial," and those words are meant to apply to existing vaults and places of burial which are in the custody of some person who has the care of them as places of burial, in the same way as a churchwarden would have the care of a burial ground; they were never intended to apply to a man in the possession of his own freehold; for a man ought not to be deprived of his property unless the language of a statute is clear and unambiguous. Section 18 of 18 & 19 Vict. c. 128, is in pari materiâ with s. 23 of 20 & 21 Vict. 81, and it was held in *Reg.* v. *Burial Board of St. John,*

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Westgate (1); that s. 18 did not apply to a burial ground which is the property of private persons, but only to parish burial grounds.

Secondly. If the order is invalid, it does not afford a protection to the defendants. The rule, that persons executing orders made by courts of competent jurisdiction are protected from actions of trespass, only applies to those cases where there has been an adjudication. Here there has been no summons, no hearing, and no adjudication. No action would lie against the Privy Council for advising the Crown; a writ of right does not lie for a tort, and if the plaintiff cannot sue the defendants he is without any remedy.

Brown, Q.C., in reply. The defendants have acted under the order made by the Secretary of State under 22 Vict. c. 1. If it has been made without jurisdiction, the plaintiff's remedy is by action against the Secretary of State: *Cobbett* v. *Grey*. (2) If the Secretary of State had acted corruptly in making the order, then the plaintiff's remedy would be by proceeding criminally: per Dallas, C.J., in *Brittain* v. *Kinnaird* (3): but as long as the order exists and is good on its face, the defendants are protected.

Cur. adv. vult.

Nov. 27. The judgment of Kelly, C.B., Byles and Keating, JJ., and Pigott, B., was delivered by

KELLY, C.B. The 20 & 21 Vict. c. 81, s. 23, gives power to the Queen, upon the advice of the Secretary of State, to order such acts to be done by, or under the direction of, the churchwardens, or such others as may have the care of any vaults or places of burial, as are necessary to prevent them from becoming dangerous to the public health.

There must, therefore, be "vaults or places of burial" which must mean vaults or places applied to burial purposes at the time the order was made, and these must be then under the care of churchwardens or other persons for the burial of the dead.

The land had been in lease from the Earls De la Warr to Bridewell hospital from the year 1679, and, with the exception of a portion fenced off to the east, had been used as a burial ground

(1) 1 B. & S. 679; 31 L. J. (Q.B.) 15; in Ex. Ch. 2 B. & S. 703; 31 L. J. (Q.B.) 205.

(2) 4 Ex. 729; 19 L. J. (Ex.) 137.

(3) 1 B. & B. at pp. 438-9.

from the earliest period of living memory, until 1844, when the last of a series of leases expired; and although the land continued to be occupied by the hospital until 1855, no burials had taken place there after 1844.

In 1857, the freeholder demised the land for ninety-nine years to one who, in 1859, granted an underlease of it to the plaintiff for fifty years. In 1854, an order had been made under the 15 & 16 Vict. c. 85, that burials in this piece of land should be discontinued. It is unnecessary to determine whether at this time the ground was or ever had been a burial ground within the acts, and consequently whether that order was a lawful and valid order or not; but the acquiescence in it by the then occupier must be held binding upon the now freeholder or his lessee. On the 23rd of July, 1859, the Secretary of State gave notice of his intention to represent to the Queen in council that to prevent the land in question called "The Burial Ground of the Precinct of Bridewell" from becoming injurious to the public health, an order should be issued for the adoption of certain measures therein specified; and this notice was ultimately delivered to the plaintiff as the person having the care of the burial ground. On the 12th of August, an order was made by the Queen in Council reciting the representation and the opinion of the Secretary of State, and proceeding to order the adoption of the measures in question. This order not being complied with, the churchwardens of St. Bride's proceeded, under the 22 Vict c. 1, s. 1, to do the acts directed; and the plaintiff having thereupon brought trespass against them, we are called upon to determine whether the order of the Queen in council was valid or void.

The land in question was the private property of Earl De la Warr; it had been under lease to Bridewell hospital for nearly two centuries, and during the latter portion of that time, possibly from a very early period, had been used as a burial ground. But it had ceased to be so used at the time when the order in question was made for a period of fifteen years, and at that time had become the property for a term of fifty years of a private individual, who was about to apply it to commercial purposes. If such an order could be lawfully made in such a case as this, no limit can be assigned to the length of time during which land, after having

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ceased to be used as a burial ground, after having been applied to other purposes, and so having become of great value to the owner, may yet, in effect, be taken away from him, and dealt with as a burial ground within the meaning of these acts of parliament.

We are of opinion that where land, in which burials may have taken place, but which has long ceased to be applied to such a purpose, has changed its character, and been treated by the owner or occupier in all respects as private property, it is not within the operation of these acts of parliament at all. It certainly appears that the burial service was performed in this piece of ground according to the rights of the Church of England; and a primâ facie presumption thus arises that the ground has at some former time been consecrated; and it has been held in the case of a churchyard, that once consecrated it cannot afterwards be lawfully applied to secular purposes without a faculty from the spiritual court. But this presumption, like all others, may be rebutted by the facts of the particular case, and we think that, looking to the class of persons, who are described as rogues and vagabonds, and others of bad character, that were buried in this ground (with some exceptions which do not materially affect the question), we are warranted in the conclusion that no consecration ever took place, and that burials in this ground having ceased for a great number of years, and the land having, as before mentioned, been applied to other purposes, it had ceased to retain, if indeed it had ever possessed, the character of a burial ground within the meaning of the act of parliament in question.

It has been suggested, though the point does not appear to have been distinctly made in argument in the Court of Queen's Bench, that the order made by the Queen in council is a judicial act, and that neither the act itself, nor anything done under it, can be questioned in this action of trespass. But we are of opinion that the statute applies, and that the authority of her Majesty in council can be exercised only where an existing burial ground is under the care of churchwardens, or other persons who have the charge of it, for the purpose of the burial of the dead. Whether this piece of ground was of this character is a question of fact, and that it was so is negatived by the circumstances of the case.

The Queen in council has jurisdiction to determine, upon the representation of the Secretary of State, whether a burial ground has become, or is likely to become, injurious to the public health, and neither her Majesty's determination, nor the representation on which it is founded, can be questioned, but neither her Majesty nor the Secretary of State possesses any jurisdiction to determine that to be a burial ground which is not a burial ground.

We are, therefore, of opinion that the order and the acts done under it were unauthorized by the statute; that this action is maintainable, and, consequently, that the judgment of the Court of Queen's Bench must be affirmed.

BRAMWELL, B. Our judgment must be for the plaintiff, in part at least, for the order in council only applies to the burial ground, and the defendants have trespassed in what is not, nor ever was, part of the burial ground. (1) They have, therefore, exceeded their authority, and to that extent are liable.

But I think they are liable to the whole cause of action. By 15 & 16 Vict. c. 85, her Majesty in council was empowered to order burials to be discontinued wholly, or subject to exception or qualification, in grounds or places of burial in or near the metropolis. Several statutes were passed subsequently on the same matter, applying to England generally, but none provided for the burial grounds not closed. This was done by the 20 & 21 Vict. c. 81, s. 23, which seems to me supplementary to, and to be read with, the former acts, and to apply to continuing burial grounds. I do not by this mean to say that it might not be applied to a ground where burials had ceased. It might, and probably does, apply to ground dedicated to burials, and where, though burials have been left off, they may be resumed as of right. But I think the ground must be a burial ground de facto or de jure, in use or in trust. The very name implies this. The statute speaks of "places of burial." Surely that means places where burials take place, or where persons are entitled to say they shall take place. Land where burials have taken but have ceased to take place is not a place of burial, but a place which has been a place of burial or a place formerly of burial. This is also confirmed by the language

(1) See Law Rep. 1 Q. B. at p. 477.

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of the section, viz., that the order is to be made on, and a notice is to be given to, the churchwardens, or such other persons as have the care of any vaults or places of burial. This seems to suppose the case of a person having charge for the purpose of using the ground as a burial ground. No notice is given to owner, or tenant, or occupier. Nor are they called on to do anything, but the person in charge is, failing him the churchwardens. This seems to me to point to small and occasional matters arising from time to time in a ground used as a burial ground, to prevent the user being a nuisance. Then, I think, this was not a place of burial within the act; it had ceased to be so de facto; it never was so de jure. Consequently, I think there was no power to make the order under which the defendants acted. It is to be observed that provision is made in the next section, 24, for disposing of parts of unconsecrated ground held by trustees, in which there has been no burial, and in which burials have been ordered to be wholly or partly discontinued. This does not apply to the present case, nor can I find any provision that does. Consequently, if the order in the present case is good, the freeholder and all are bound for ever, even as to parts of the ground unused.

The order being invalid, I think it is no protection for the defendants. The distinction is between those cases where there is an adjudication: *Ashcroft* v. *Bourne* (1), *Brittain* v. *Kinnair* (2), and those where there is an order only: see *Wilkins* v. *Hemsworth.* (3) If the statute in this case had given a power to adjudicate and to order execution, the defendants would have been protected. But it gave no such power, neither in words nor by implication. The owner, tenant, and occupier may be wholly without notice of the proceedings, and it would be unreasonable they should be bound by a judgment.

I think, therefore, the plaintiff is entitled to recover.

BYLES, J. I desire to add one observation, that the effect of our judgment may not be misunderstood. The question before the Court is simply this, whether the churchwardens were acting under a valid order of the Secretary of State, and are therefore justified by the act of parliament in what they have done.

(1) 3 B. & Ad. 684. (2) 1 B. & B. 432. (3) 7 A. & E. 807.

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We are not called upon to give any opinion as to the legality of any act which the freeholder, his lessee, or sub-lessee may have already done or may hereafter do. Nor will our decision encourage or justify any abuse by the freeholder, his lessee, or sub-lessee, or any person acting under them. A dead body by law belongs to no one, and is, therefore, under the protection of the public. If it lies in consecrated ground, the ecclesiastical law will interpose for its protection; but, whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly and indecently disinterring them, are the ground of an indictment.

Judgment affirmed.

Attorneys for plaintiff: *Miller & Sons.*
Attorney for defendants: *Edmunds.*

LEBEL AND ANOTHER *v.* TUCKER.

Nov. 27.

Bill of Exchange—Indorsee against Acceptor—Contract of Acceptor of English Bill—English Bill indorsed abroad—Lex loci contractûs—Conflict of Laws.

On a bill of exchange payable to order, drawn, accepted, and payable, in England, the contract of the acceptor is to pay to an order valid by the law of England; and an indorsee can maintain an action in England against the acceptor, under an indorsement valid by the law of England, although the indorsement was made in France, and by the law of France gave no right to the indorsee to sue in his own name, and although the indorser (who was also drawer and payee) and the indorsee were, at the time the bill was made and indorsed, subjects of France and domiciled and resident in that country.

Quære, what were the rights of the indorsee against the indorser, either in England or France.

DECLARATION that certain persons trading by the style of Cresswell, Cavernier & Co., on the 29th of August, 1866, by their bill of exchange directed to the defendant, required the defendant to pay to their order 1000*l.* on the 15th of October then next; that the defendant accepted the bill, and the said persons indorsed it to the plaintiffs; but the defendant did not pay the same.

Pleas: 5. That the indorsement was made in France, and subject to the law of that country, and the indorsement has not transferred

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to the plaintiffs a right of suing on the bill in their own names, the indorsement not being conformable to the law of France, whereby indorsements of bills of exchange must be dated, and must express the consideration or value of such indorsement and the name of the indorsee, and whereby an indorsement not conformable thereto does not operate to transfer such right of suit. 7. Repeating the allegations in the fifth plea, and that the drawers indorsed the bill immediately to the plaintiffs, and the plaintiffs and the drawers, when the bill was made and indorsed, were resident and domiciled in France, within the empire of France, and were respectively subjects of such empire.

Replication to the fifth and seventh pleas, that the bill of exchange was drawn in England, accepted in England, and payable in England, and the indorsement to the plaintiffs was in accordance with English law.

Demurrer to the fifth and seventh pleas.

Demurrer to the replication.

Nov. 26. *Raymond* for the plaintiffs. The facts appearing on the record are, that the bill was drawn, accepted, and payable, in England, drawn by French subjects, and indorsed by them in France to French subjects, the indorsement being in blank and therefore invalid according to the law of France. The bill being drawn, accepted, and payable, in England, the contract was altogether an English contract; and the domicile or nationality of the parties cannot affect it. The action being against the acceptor, the question is, what is the contract of the acceptor? He promises to pay to an order valid according to the law of the place of contract. The lex loci contractûs must prevail; and the circumstance that the bill was negotiated in a country where a different law as to transfer prevails cannot affect the original contract. *Trimbey* v. *Vignier* (1) in effect decides the question. That was the case of a French promissory note, indorsed in blank in France, and the Court held that the law of France must override the whole contract. In *De la Chaumette* v. *Bank of England* (2) it was held that a promissory note payable to bearer in England was transferable by delivery in a foreign country, and Lord Tenterden observes in his judgment:

(1) 1 Bing. N.C. 151. (2) 2 B. & Ad. 385, 389.

"If an inland bill of exchange, drawn and accepted in England, gets to Paris, it is undoubtedly negotiable there by the custom of merchants." Story, Conflict of Laws, s. 279, after observing upon the different views of foreign jurists as to which law is to govern, where the contracting parties are of different nationalities, proceeds: "In the common law of England and America, all these niceties are discarded. Every contract, whether made between foreigners, or between foreigners and citizens, is deemed to be governed by the law of the place where it is made, and is to be executed. Hertius (1) has put a case, where a contract made in one country is subject to a condition, and the performance of that condition takes place in another country, the laws of which are different; and the question is, whether the laws of the one or those of the other ought to govern the contract. He answers, the laws of the country where the contract was made, because the condition when fulfilled refers back to the time of the contract." In s. 316*a*, Story says: "Another illustration of the general doctrine may be derived from the case of negotiable paper, as to the binding obligation and effect of a blank indorsement." And he then cites with approbation the decision of *Trimbey* v. *Vignier* (2) as being "founded in the true principles of international jurisprudence; for it relates not to the form of the remedy, but to the interpretation and obligation of the contract." Again, in s. 317, Story says: "Suppose a negotiable note is made in one country, and is payable there, and it is afterwards indorsed in another country, and by the law of the former country equitable defences are let in, in favour of the maker, and by the latter such defences excluded; what rule is to govern in regard to the holder in a suit against the maker to recover the amount upon the indorsement to him? The answer is, the law of the place where the note was made; for there the maker undertook to pay; and the subsequent negotiation of the note did not change his original obligation, duty, or rights. Acceptances of bills are governed by the same principles. They are deemed contracts of acceptance in the place where they are made, and where they are to be performed." The contract, if there is one, between the indorser and indorsee, can have no

(1) De Collis. Leg. s. 4, § 54; Opusc. vol. i., tom. i., p. 147, ed. 1737.
(2) 1 Bing. N.C. 151.

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effect on the original contract of the acceptor; it has, in fact, nothing to do with the matter: for there may be a transfer of the right of suit without any contract or liability at all on the part of the transferor; as in the case of an indorsement sans recours, or by an infant, or as in the case of *Smith* v. *Johnson.* (1)

Nov. 26 and 27. *Hayes, Serjt.* (*Harington* with him), for the defendant. An indorsement is a new contract, and is governed by the lex loci contractûs, and therefore must, in order to be valid, have all the formalities required by the law of the place where it is made. The title, if acquired at all, is acquired in France, and therefore there can be no title, if none is acquired by the law of France. The decision of *Trimbey* v. *Vignier* (2) was altogether independent of the note being French. It proceeded on the ground that the contract of transfer by indorsement was in France, and that, therefore, that contract must be governed by the law of France. The judgment itself shews this; and it is clear that Story so understands the judgment, for he says in the section (316*a*) already cited from the Conflict of Laws, after stating what is required in France to make an indorsement a valid transfer:—"Now, let us suppose a note made in Paris, payable to the order of the payee, and he should there indorse the same in blank, without the prescribed formalities, and afterwards the holder should sue the maker of the note in another country, for example in England, where no such formalities are prescribed; the question would arise, whether the holder could recover in such a suit in an English court upon such an indorsement. It has been held that he cannot;" he then cites *Trimbey* v. *Vignier* (2), and proceeds, "and this decision seems to be founded in the true principles of international jurisprudence; for it relates not to the form of the remedy, but to the interpretation and obligation of the contract *created by the indorsement, which ought to be governed by the law of the place of indorsement.*" And in Story on Bills of Exchange, s. 156, this section (316 *a*) is repeated. Again, it has been held that an English bill may be discharged by a payment good in the country where made: *Ralli* v. *Dennistoun.* (3)

[LUSH, J. referred to *Rothschild* v. *Currie.* (4)].

(1) 3 H. & N. 222; 27 L. J. (Ex.) 363.
(2) 1 Bing. N.C. 151.
(3) 6 Ex. 483.
(4) 1 Q. B. 43.

That case, though to a certain extent acted upon in *Hirschfeld* v. *Smith* (1), has been questioned, particularly by Story, On Bills, s. 296, n. (2). Pothier, Contrat de change, no. 38, gives as a reason for the particularity required in an indorsement by the French code, that it is a fresh contract just as the original bill; and it is clear that it is a new contract, for if the indorsement be general the bill becomes payable to bearer.

[MELLOR, J. In Byles on Bills, p. 139, 8th ed., it is said, "Every indorser of a bill is in the nature of a new drawer."]

That was the ground of the decision in *Allen* v. *Walker*. (3)

[LUSH, J. But the indorser is not the drawer of a new bill.]

The indorsement is a contract by which a fresh person becomes a party and acquires a right to sue on the instrument; though not a new bill, there is a new contract, which, therefore, must be governed by the lex loci.

[LUSH, J. See to what results that would lead. If the holder of an English bill, indorsed generally, hand it over to another for value in France, the latter could not, if that argument is right, sue upon it even if he brought it back to England: but if the same thing had been done in England he could.]

In Story on Bills of Exchange, s. 131, the law is thus laid down: "In respect to foreign bills of exchange, they are generally, as to their validity, nature, interpretation, and effects, governed by the laws of the state or country where the contract between the particular parties has its origin. The contract of the drawer is, as to the form, the nature, the obligation, and the effect thereof, governed by the law of the place where the bill is drawn, in regard to the payee, and any subsequent holder. The contract of the indorser is governed by the law of the place where the indorsement is made, as to his indorsee, and every subsequent holder. The contract of the acceptor is governed by the law of the place of his acceptance, as to the drawer, the payee, and every subsequent holder, unless he accepts in one place payable in another place; for in the latter case the law of the place where the bill is payable will govern, in regard to the same parties. So that very different contracts, of very different natures, and of various obliga-

(1) Law Rep. 1 C. P. 340, 351. Law Rep. 1 C. P. at pp. 344-6.

(2) See this note given at length, (3) 2 M. & W. 317.

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tions, may arise between different parties, under one and the same bill of exchange, according to the place where the particular transaction takes place." In France, most certainly, the law is, that an indorsement to be valid must be in accordance with the law of the place where it is made. Thus, in *Herschfeld* v. *Smith* (1) a passage is cited from Bravard-Veyrières' and Demangeat's treatise on Commercial Law, vol. 3, tit. Lettre de Change, p. 33, which puts the exact converse of the present case, and the authors say: If a bill of exchange is indorsed in London, although the bill were drawn in France and be payable in France, recourse must be had to the English law to ascertain the validity of the indorsement and to determine its effects. In *Allen* v. *Kemble* (2), in the judgment of the Judicial Committee, delivered by Lord Kingsdown, it is put as a proposition not denied, "that when a bill is drawn generally, the liabilities of the drawer, acceptor, and indorser, respectively, must be governed by the laws of the countries in which the drawing, acceptance, and indorsement, respectively took place."

[LUSH, J. "Respectively:" that is, that the liability of the acceptor on his contract is governed by the law of the country in which the acceptance takes place.]

Here the drawer and payee was a Frenchman, living in France, and the bill is payable to his order, not to bearer. The probability was, therefore, that the bill would be indorsed in France; and the contract is to pay to an order valid according to the law of the country where the bill may be negotiated.

[LUSH, J. The interpretation of the contract cannot vary according to the nationality of the parties, it must depend on the law of the place of contract.]

Raymond in reply. The action is against the acceptor; and the single question is, what was the contract of the acceptor? He can only be taken to have contracted with a view to the law of the country which is the place of contract. The passage cited from Story on Bills, s. 131, is directly in the plaintiffs' favour; for he says: "The contract of the acceptor is governed by the *law of the place of his acceptance*, as to the drawer, the payee, *and every subsequent holder*." And it is quite immaterial for the present question what the rights of the indorsee against the indorser may be.

(1) 1 Law Rep. 1 C. P. at p. 347. (2) 6 Moo. P. C. at p. 321.

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MELLOR, J. Although the point raised is novel and somewhat important, yet the authorities have been so fully brought before us, and having had the opportunity for consideration since yesterday, as we have really no doubt on the subject, we think we may proceed to give judgment at once. The action is brought by indorsee against acceptor, and it appears from the replication that the bill was drawn, accepted, and payable, in England, and the indorsement was valid according to the law of England. The question is, whether the contract of the acceptor, which is to pay to the order of the drawer, amounts to a contract to pay to any order if valid by the law of England, and we think that it does. I abstain altogether from expressing any opinion, as it is quite unnecessary to do so, as to what might be the effect of an indorsement of the bill in blank in France, as between the indorser and any subsequent indorsee in an action against the indorser himself; all we have to determine is, whether the indorsement, made according to the law of England, though made in France, was made according to the contract of the parties, so as to pass to the holder the right to sue the acceptor. It has been said that every indorser is in the nature of a new drawer; and no doubt he is so for some purposes, as against himself, and to that extent there is a new contract created by the indorsement; but the original contract remains. *Trimbey* v. *Vignier* (1) is an authority in favour of this view. That was the case of a *foreign* promissory note; and the question really turned on whether an indorsement according to the English law enabled the holder to sue the maker in England; and the Court held that it did not; as it was a matter which went to the interpretation of the contract, and not merely to the mode of instituting the suit. We have here to interpret the contract, which was made in England, to be performed in England, and we are satisfied that the indorsement need only be such as the contract contemplates. We think that the acceptor in a case like the present undertakes to pay to the payee or his order by an indorsement valid according to the English law.

LUSH, J. I am of the same opinion. The action is on a bill drawn, accepted, and payable, in England, and which is therefore

(1) 1 Bing. N. C. 151.

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an inland bill; and the action is brought by persons claiming the right to sue by title derived from the drawers and payees according to the English law. The defence is, that the indorsement was made in France, and is not conformable to the law of France, which requires that the indorsement should bear a date, and express the consideration for the indorsement and the name of the indorsee. The question is, is that any answer to an action against the acceptor of an English bill? The circumstances are somewhat novel, but the principle applicable is not novel; it existed before, and is well established by the decision in *Trimbey* v. *Vignier* (1), viz., that contracts must be governed by the law of the country where they are made. Now, the contract on which the present defendant, the acceptor, is sued, was made in England. The contract which the drawer proposes is this: he says, "Pay a certain sum at a certain date to my order;" the acceptor makes this contract his own by putting his name as acceptor, and his contract, if expanded in words, is, "I undertake at the maturity of the bill to pay to the person who shall be the holder under an indorsement from you, the payee, made according to the law merchant." How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character; it remains an inland bill up to the time of its maturity, and is negotiable according to English law; and by the English law a simple indorsement in blank transfers the right to sue to the holder. This principle is pointedly applied by the judgment in *Trimbey* v. *Vignier*. (1) My Brother Hayes is mistaken in supposing that the judgment deals simpliciter with the place of the indorsement, without reference to the fact of the instrument itself being a French note; on the contrary, that fact lies at the very bottom of the decision. Thus, at the very commencement of the judgment Tindal, C.J., after saying that the point reserved was, whether the plaintiff, under the circumstances stated in the case, was entitled to maintain the action in an English court of law in his own name, proceeds: "The promissory note *was made by the defendant in France;* and it was indorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at

(1) 1 Bing. N. C. 151.

the respective times of making and indorsing the note domiciled in that country. The first inquiry, therefore, is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France." He then discusses what is the law of France, and comes to the conclusion that the plaintiff, the indorsee, could not have sued the maker in his own name in the courts of France; and proceeds: "The question, therefore, becomes this: Supposing such rule to prevail in the French courts by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England, applicable to the case of a note indorsed in blank in England, allowing the action to be brought in the name of the holder? The rule which applies to the case of contracts, made in one country and put in suit in the courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made (lex loci contractûs), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought." He then cites authorities for this position, and concludes: "The question, therefore, is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit. . . . . And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. . . . . If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. . . . . We think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here." The judgment, therefore, proceeds on the ground that the contract, that is, the contract of the maker of the note, having been made in France, it must be governed by the law of France. So here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that

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a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes. Therefore, as it seems clear to me, the plaintiffs are entitled to judgment. It is not necessary to consider what would be the effect of this indorsement as against the indorser, if sued in France; probably, the courts of France would hold that the English law governed. All we decide is, that, the acceptor having contracted in England to pay in England, the contract must be interpreted and governed by the law of England, and that the plaintiffs have acquired a right to sue.

Judgment for the plaintiffs.

Attorney for plaintiffs: *H. J. Godden.*
Attorney for defendant: *J. Tucker.*

Nov. 26.

ASH AND ANOTHER *v.* POUPPEVILLE.

Pleading—Plea puis darrein continuance—Plea of Payment after Action in satisfaction of the Debt, without mentioning Damages.

Declaration, in the common form, for goods sold and delivered, claiming 120*l*. Pleas: 1. Never indebted; 2. "And for a further plea the defendant says," that the goods were sold under a warranty, that when delivered they did not correspond with the warranty, and thereupon, before suit, disputes arose between the plaintiffs and the defendant, in respect of the alleged breach of warranty; and after the commencement of the suit, and after the last pleading, it was agreed that the plaintiffs should accept from the defendant 60*l*. in settlement of the debt sought to be recovered in the action; and the defendant thereupon paid and the plaintiffs accepted 60*l*. in satisfaction and discharge of their said debt. On demurrer to the second plea:—

Held, that the plea, being pleaded generally, must be taken to be pleaded to the whole causes of action; and as it alleged the payment after action to have been in satisfaction of the debt only, it was bad for leaving unanswered any damages to which the plaintiffs might be entitled.

DECLARATION. That the plaintiffs sue the defendant for money payable by the defendant to the plaintiffs, for goods sold and delivered, and on an account stated, and the plaintiffs claim 120*l*.

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Pleas: 1. That the defendant never was indebted as alleged. 2. "And for a further plea the defendant says," that the goods were warranted by the plaintiffs at the time of sale to be of good and sound quality, and the account was stated in respect of the said goods, and when the goods were delivered to the defendant he discovered, as was the fact, that they were not of good and sound quality and that they did not correspond with the warranty, and thereupon and before this suit disputes arose between the defendant and the plaintiffs in respect of the alleged breach of warranty on the part of the plaintiffs, and after the commencement of this suit, and after the last pleading in it, it was agreed between the plaintiffs and the defendant that the defendant should pay to the plaintiffs and the plaintiffs should accept and receive from the defendant the sum of 60*l.* in settlement of the debt sought to be recovered by the plaintiffs in this action, and thereupon the defendant paid to the plaintiffs the said sum of 60*l.*, and the plaintiffs accepted and received the same in satisfaction and discharge of their said debt.

Demurrer to the second plea, and joinder.

H. T. Cole, Q. C. (*C. Russell* with him), in support of the demurrer. No doubt a plea of payment of a smaller sum in satisfaction of a larger, with an agreement to pay costs, would have been good: *Cooper* v. *Parker* (1); but this is a plea to the further maintenance of the action, and alleges the payment and acceptance of a smaller sum in satisfaction of the debt only; and it leaves unanswered the plaintiffs' claim for damages and costs.

[LUSH, J. Costs are the only real part of damages in such a case. Do not the rules under the Common Law Procedure Act, 1852, enable the plaintiffs to get their costs? (2)]

Possibly that may be an answer as to costs; but the plea leaves the damages unanswered. It may be that they are not merely nominal, but substantial; at all events the plaintiffs would be entitled to a verdict for 1*s.* damages for the detention of the debt: *Nosotti* v. *Page* (3); but the defendant would be entitled to a verdict if issue were taken on the plea as it stands.

(1) 15 C. B. 822; 24 L. J. (C.P.) 68. (2) See 22, 23 Reg. Gen. T. T. 1853.
(3) 10 C. B. 643; 20 L. J. (C.P.) 81.

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[LUSH, J. A plea of payment of 100*l.* to the further maintenance of the action as to 100*l.* would be good; and the plaintiffs can sign judgment for the nominal damages and the costs; it is a mere technical objection as to the mode of pleading.]

It may be so; but the present pleading precludes the plaintiffs from trying the issue, whether the 60*l.* was paid and received in satisfaction of all the claims of the plaintiffs. In *Thame* v. *Boast* (1), the payment of 25*l.* was alleged to have been in satisfaction of the cheque of 25*l.* sued upon and of damages and costs, and it was proved that the plaintiff had taken the 25*l.*, and had said he would pay the costs, and it was held, that, as the damages could only be nominal, the plea was proved; that decision is questionable: and in *Goodwin* v. *Cremer* (2), a plea, puis darrein continuance, to an action by indorsee against acceptor, that a previous indorser had paid the plaintiff the amount of the bill and interest, in full satisfaction of the bill and all moneys due in respect thereof, without mentioning damages and costs, was held bad.

[LUSH, J. That was before the rules under the statute of 1852.]

The rules cannot make any difference as to the proper mode of pleading. (3)

K. E. Digby, for the defendant. The plea alleges the payment to have been "after the last pleading," the plaintiffs therefore can confess the plea and sign judgment for the costs, by 23 Reg. Gen. T. T., 1853; and as to the damages, which, exclusive of costs, can be but nominal, payment of a sum in satisfaction of the debt must be taken to be in satisfaction of the debt and damages: see per Willes, J., delivering the judgment of the Exchequer Chamber in *Tetley* v. *Wanless* (4), approving the opinion of Maule, J., in *Beaumont* v. *Greathead*. (5) At all events the plea is a perfectly good answer to part of the plaintiffs' claim, viz., the debt; and the proper course was for the plaintiffs to sign judgment

(1) 12 Q. B. 808.
(2) 18 Q. B. 757; 22 L. J. (Q.B.) 30.
(3) See *Cook* v. *Hopewell*, 11 Ex. at p. 132. 555; 25 L. J. (Ex.) 71.
(4) Law Rep. 2 Ex. at p. 280.
(5) 2 C. B. at p. 499; 15 L. J. (C.P.)

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for that part (if any) of the claim which was left unanswered by the plea: *Henry* v. *Earl.* (1)

Cole, Q.C., in reply. In that case the plea was pleaded to the debt only. Here the plea is pleaded generally to the whole declaration, and therefore professes to answer the whole causes of action, and does not answer the damages.

[LUSH, J. Is not that a mere formal objection, and the subject of special demurrer?]

It is matter of substance. In Bullen and Leake's Pleading, p. 383, it is laid down: "Every plea must in substance answer the whole matter to which it is pleaded; and if it does not give a sufficient answer to the whole, it is bad in substance, and the plaintiff may demur, but he cannot in that case sign judgment for the matter insufficiently answered:" citing note (3) in 1 Wms. Saund. 28*a*. In *Goodwin* v. *Cremer* (2) it was treated as matter of substance.

[LUSH, J. Does not my Brother Willes in *Tetley* v. *Wanless* (3) say that payment of the debt may be treated as payment of the debt and damages for its detention?]

That is, if the damages are nominal only; but for aught that appears on these pleadings, the damages may not be merely nominal. The whole passage in *Tetley* v. *Wanless* (3) is greatly in favour of the plaintiffs' contention. The learned judge says that the cases referred to were cases "not of release but of payment, when the question has arisen what the payment covered. It might turn out to be confined to the debt, and the damages for the detention of the debt would then remain to be sued for. Even in the case of payment, however, we agree with the opinion expressed by Maule, J., in *Beaumont* v. *Greathead* (4), that a payment in satisfaction and discharge of a debt is a payment in satisfaction and discharge of the nominal damages due for its detention. But no doubt an argument might arise as to whether the payment pleaded was made on account only, or in discharge of the debt and damages. That might be, as appears from *Goodwin* v. *Cremer* (2), a question for the jury. It might appear that the payment was in satisfaction of everything, or

(1) 8 M. & W. 228.
(2) 18 Q. B. 757; 22 L. J. (Q.B.) 30.
(3) Law Rep. 2 Ex. at p. 280.
(4) 2 C. B. at p. 499; 15 L. J. (C.P.) at p. 132.

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of the debt only, and not of its accessories." In the present case, assume that the payment was made in terms, as alleged in the plea, in satisfaction of the debt only, it may be, as Willes, J. says, that the jury might still be justified in finding that the payment was intended in satisfaction of the damages also, if they turn out merely nominal, but if they are substantial the plaintiffs would clearly be entitled to a verdict. But on a traverse of the plea, as it stands, the defendant must succeed. The plaintiffs have a right to have the issue tried if they choose; but in order to raise it the payment should have been alleged to have been made in satisfaction of the debt and damages.

[LUSH, J. If the damages are left unanswered, why may not the plaintiffs sign judgment for them?]

The plaintiffs cannot sign judgment as long as there is a plea pleaded to the whole cause of action. The authorities cited in Bullen and Leake's Pleading, p. 383, are clear on this point.

[LUSH, J. The plea is pleaded without any limitation at the commencement. Does the rule still remain that such a plea must be taken to be pleaded to the whole action?]

It is presumed that it does. (1)

MELLOR, J. On the whole I have come to the conclusion that Mr. Cole is right, and that on the face of these pleadings it is impossible to say whether there are real or merely nominal damages which the jury may give. Looking at the form of the plea, it must be taken to be pleaded to the whole causes of action, and it does not answer the damages, and so is bad.

LUSH, J. I am of the same opinion. Mr. Cole has convinced me that my first impression, which certainly was very strong, was erroneous, and that the plea is defective in not saying that the payment was made in satisfaction of the damages as well as of

(1) In Bullen and Leake's Pleading, p. 383, it is said:—"A plea to one of several counts, or to a part of a count must be expressly limited in the commencement to the count or part to which it is pleaded; and if not so limited it is taken to be pleaded to the whole declaration." See s. 67 of Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). By rule 9 of Reg. Gen. H. T. 4 Wm. 4, 1834, pleadings, unless otherwise expressed, were to be taken as pleaded in bar of the whole action, or in maintenance of the whole action; but these rules were repealed by Reg. Gen. T. T., 1853.

the debt. It is a case, however, for amendment, and the defendant may have leave to amend, otherwise judgment for the plaintiffs. (1)

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Attorneys for plaintiffs: *Smith, Fawdon, & Low.*
Attorneys for defendant: *Vallance & Vallance.*

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Nov. 25.

Evidence—Inspection of Documents—14 & 15 *Vict. c.* 99, *s.* 6—17 & 18 *Vict. c.* 125, *s.* 50.

To an action by executors to recover damages for the death of the testator, caused, as alleged, by the negligence of the defendants, a railway company, the defendants pleaded not guilty, and that the deceased had accepted 75*l.* in discharge of all claims connected with the accident from which it was alleged the death had afterwards resulted. The defendants had sent a clerk in their secretary's office and their medical officer to see the deceased, and ascertain his state, and to negotiate as to the pecuniary compensation to be made him.

The Court ordered the plaintiffs inspection and copies of the reports made to the defendants by these officers of their interviews with the deceased.

RULE, calling on the plaintiffs to shew cause why so much of an order of Shee, J., should not be rescinded as ordered inspection and copies of certain documents to be allowed to the plaintiffs.

The action was brought by the plaintiffs as executors of Richard Baker, deceased, under 9 & 10 Vict. c. 93, to recover damages for the death of the deceased, caused, as was alleged, by the negligence of the defendants. The defendants had pleaded not guilty, and that the deceased had received from the defendants 75*l.* in discharge of all claims connected with the accident from which it was alleged the deceased had met his death.

(1) The defendant amended, by pleading the second plea to so much of the declaration as alleged a debt for goods sold and on an account stated in respect of them and "any damages in respect of the non-payment thereof," and alleging the payment of 60*l.* to have been made in satisfaction of such debt and damages: See *Cook* v. *Hopewell* (11 Ex. 555; 25 L. J. (Ex.) 71.)

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The deceased had met with an accident while a passenger on the defendants' railway, on the 24th of March, 1866, and the defendants had sent their medical man to ascertain the real nature of the injury the deceased had sustained, and had also sent a clerk in their secretary's office with a view to settle with him as to the pecuniary compensation to be made him, and ultimately, through these negotiations, the deceased agreed to accept, and signed a receipt on the 11th of May, 1866, for 75*l.*, in discharge of all claims connected with the accident.

The deceased afterwards became suddenly worse, and died, as was alleged, in consequence of the injuries he had sustained by the accident; upon which the present action was brought.

The documents, the possession of which the defendants had admitted on affidavit, but the production of which the defendants resisted, on the ground that they were confidential communications made to the defendants by their agents or servants in the course of their duty, were:—

Two reports of Henry Case, who was the clerk in the secretary's office of the defendants, and sent by the defendants to the deceased to communicate with him respecting the accident, dated respectively the 27th of April and the 3rd of May, 1866.

Two reports of G. J. Vine (who was the medical officer of the defendants employed on their behalf to visit the deceased) to the defendants respecting the examination of the deceased connected with the accident, dated respectively the 3rd and 14th of April, 1866.

Thesiger shewed cause. The issues which will be raised are, first, whether the defendants were guilty of negligence; secondly, whether the death of the deceased resulted from the injuries sustained by him on the occasion of the accident; and, thirdly, whether the accord and satisfaction alleged was made under such circumstances as to make it a bar to the action. The case of the *Chartered Bank of India, &c.* v. *Rich* (1) was cited on moving the rule; but that case is distinguishable; here the communications (even if they would be otherwise privileged as made by confidential agents) were accounts of interviews with the

(1) 32 L. J. (Q.B.) 300; 4 B. & S. 73.

deceased, who is now represented by the plaintiffs, and the plaintiffs are therefore entitled to inspect the documents. That case also shews that the protection as to confidential communications is confined to the case of persons holding the relative position of attorney and client; see also Taylor on Evidence, 4th ed. vol. 1, p. 796.

C. W. Wood in support of the rule. It is for the defendants to make out the accord and satisfaction, consequently the documents in question relate to the defendants' case exclusively; the plaintiffs are, therefore, not entitled to inspection.

[LUSH, J. referred to *Hawkins* v. *Carr.* (1)]

The accord and satisfaction in the present case is entirely for the defendants to make out, and is not like the case of a settlement of accounts between parties, where the account belongs as much to one side as the other. The communications were made between confidential agents and their principals, and are privileged from production on this ground.

COCKBURN, C.J. This is a case in which the company sent their medical agent to the deceased man to see him and ascertain what was his real state, and also another agent for the purpose of effecting an arrangement. Surely the parties representing the deceased have an interest in the result of these interviews, and a right to know the result as communicated in writing by the agents to their principals. I adhere to the decision in *Chartered Bank of India, &c.* v. *Rich* (2); but the present case is clearly distinguishable, because in that case the documents in question were letters from the one party's own private and confidential agents who had never placed themselves in communication with the other party; and I quite agree that, when confidential communications have taken place between you and your agent, who has been sent to inquire and report about the subject matter of the litigation, you are not in general to be compelled to tell your adversary what the result of the inquiries may be. But when you send your agents to see and negotiate with the other party, whatever passes at such interviews ought to be made known, and the other party, or those representing him, have a right to inspect the communications respecting

(1) Law Rep. 1 Q. B. 89. (2) 4 B. & S. 73; 32 L. J. (Q. B.) 300.

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them. The documents in such a case appear to me to come within the principle of the decision in *Daniel* v. *Bond.* (1)

SHEE and LUSH, JJ., concurred.

Rule discharged.

Attorneys for plaintiffs: *Linklaters, Hackwood, & Addison.*
Attorney for defendants: *L. Crombie.*

Nov. 15.

TULK *v.* THE METROPOLITAN BOARD OF WORKS.

Act for the Protection of Garden or Ornamental Grounds in Cities and Boroughs (26 *Vict. c.* 13) *ss.* 1 *and* 2—"*Garden set apart otherwise than by revocable permission of Owners for use of the Inhabitants of a Square.*"

In 1786, the representatives of T. and P. respectively were tenants in common in fee of the lands and houses forming a square in London, with the garden in the middle, a decree in chancery for a partition was obtained, and a commission issued. The commissioners certified that the land and houses on the north side should be allotted to the P.s in fee, and the land and houses on the other three sides, together with the garden, to the T.s in fee; that the lessees of houses, &c. on the north side should continue to pay to the owners of the second allotment the sum reserved in their leases towards keeping up the square garden; and that the owners of the second allotment should for ever keep and maintain the garden in its then state as a pleasure ground. A decree was then made that the estates should be held in severalty, as allotted by the certificate; and mutual conveyances were executed accordingly, which recited the decrees and certificate: but there was no covenant on the part of the owners of the second allotment to keep up the square garden. At the time of the partition most of the leases granted by the original coparceners, under whom T. and P. claimed, were in existence, and the last lease did not expire till 1847, and in the leases there were covenants by the lessees to pay certain small annual sums towards keeping up the square garden, and covenants on the part of the lessors to apply them to that purpose.

In 1807, J. T., the then tenant for life, and his son, C. T., the tenant in tail in remainder, of the property in the second allotment, executed a conveyance (which was carried out by a recovery), by which C. T., the son, took in fee the hereditaments on the east and partly south side of the square and the square garden, and J. T. took the hereditaments on the west and the rest of the south side, and C. T. covenanted for himself, his heirs, &c., with J. T., his heirs, &c., for ever after to keep the square garden in its then state and in good repair, &c. In 1808, C. T. conveyed the square garden in fee to E., who covenanted with C. T., &c., to keep the garden in its then state, and that it should be lawful for J. T. and

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(1) 9 C. B. (N. S.) 716.

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C. T., and their respective tenants, inhabitants of the square, on payment of a reasonable sum, to have keys and admission at all times into the garden.

Up to 1851 the garden was constantly used as a promenade and place of recreation by such of the inhabitants of the square as chose to pay a guinea or a guinea and a half per annum to the owners for the time being of the garden, for keys. After several mesne assignments, in 1851, the garden became vested in fee in W., who proposed to erect a building in it. L. T., the devisee from J. T. of all his share in the property conveyed to him by the deed of 1807, and the owners of most of the property in the square comprised in that deed opposed this, and by an agreement between them and W. they granted him a licence to erect and maintain the proposed building for ten years, provided that the licence should not operate as a waiver of the covenants in the deeds of 1807 and 1808; and W. covenanted to restore the garden at the end of the ten years to its former state. At the end of the ten years W. removed the building, and the plaintiff (who was also joint-devisee under the will of L. T. of J. T.'s share), as heir-at-law of L. T., exercised an option, given to L. T. in the agreement of 1851, of purchasing an undivided moiety of the garden; and the garden accordingly, by a deed of 1861, became vested in the plaintiff and W. as tenants in common in fee.

The owners of the houses on the north side of the square were no parties to any dealing with the garden.

In 1865, the garden being in a neglected and dilapidated state, the Metropolitan Board of Works took possession of it, under 26 Vict. c. 13, s. 1, which enacts that "where in any city or borough any enclosed garden or ornamental ground has been set apart, otherwise than by the revocable permission of the owner thereof, in any public square, &c., for the use or enjoyment of the inhabitants thereof, and where the trustees or other body appointed for the care of the same have neglected to keep it in proper order, or where such garden or ground has not been vested or placed under the management of trustees, &c., for the care of the same, and from want of such care or any other cause has been neglected, the Metropolitan Board of Works, where the same is within their jurisdiction (except in the city of London), and in any other city or borough the corporate authorities, shall take charge of the same, putting up a notice to that effect in such garden or ground." The plaintiff having brought an action of trespass against the Board:—

Held, that, whatever might be the rights at law or in equity of the owners and occupiers of the houses round the square, the garden had not been set apart for the use or enjoyment of the inhabitants of the square otherwise than by the revocable permission of the owner, within the meaning of the above section; and, consequently, the Board were trespassers.

Quære, whether the case was within the second section of the act.

Declaration, that the defendants, on the 4th of January, 1865, broke and entered certain land of the plaintiff, being the land enclosed with iron railings in the middle of the square called Leicester Square, in the parishes of St. Martin's in the Fields and Saint Ann's, Soho, in the county of Middlesex, and then and there caused to be set up and fixed in the said land divers posts, boards, and notices, by reason whereof the title of the plaintiff to the said

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land has been much questioned and damaged, and the plaintiff has been otherwise greatly injured.

Pleas: 1. Not guilty. 2. That the land was not the plaintiff's as alleged. 3. That the land was and is an enclosed garden or ornamental ground in the city of Westminster, and in a place under the jurisdiction of the defendants, and not in the city of London, and before and at the time when, &c., had been and was set apart otherwise than by the revocable permission of the owner thereof in a certain public square for the use or enjoyment of the inhabitants thereof within the meaning of 26 Vict. c. 13, "An act for the protection of certain garden or ornamental grounds, in cities and boroughs," and the land before and at the time when, &c., had been and was vested in and placed under the management of a certain body, to wit, a body of trustees or commissioners appointed for the care of the same. And before and at the time when, &c., the said body had neglected, and did neglect to keep the same in proper order. And the acts and alleged trespasses and causes of action in the declaration mentioned were lawfully done and caused by them under and in pursuance of the said act, and in exercise of the powers by the said act given to the said Metropolitan Board of Works, and all conditions were fulfilled and all things happened and all times elapsed which by law were required to render the said acts alleged trespasses and causes of action lawful, and to entitle the defendants to do and cause the same to be done. 4. Repeating the allegations in the third plea, except that instead of alleging that the land had been and was vested in and placed under the management of such body as therein mentioned, and that such body had neglected to keep the same in proper order, it alleged that the land being such garden or ground as in the introductory part of the third plea mentioned, had not been vested in or placed under the management of any trustees, commissioners, or other body for the care of the same, and that the said land had been and was neglected within the meaning of the said act.

Issues joined and taken.

At the trial before Cockburn C.J., at the sittings for Middlesex after Michaelmas Term, 1865, a verdict was found for the plaintiff, subject to a special case.

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1. The piece of land now known as Leicester Square, was formerly and previously to the year 1772, part of a large estate belonging to the Sidneys, Earls of Leicester, and in the seventeenth century contained open fields. In that century the Sidneys built a large mansion on the north side of what is now Leicester Square, and situate at the north-east corner near Cranbourne Street, which was called Leicester House, and was the residence of several successive Earls of Leicester; part of this land, including the part upon which Leicester House was built, the site of the gardens and "the field opposite" (the latter being the centre plot or enclosure of Leicester Square now in question), were formerly "Lammas land," upon which the inhabitants of the parish of St. Martin had a right to turn their cattle at Lammas time after the crops were removed.

The parish of St. Martin's formerly allowed the owners of property adjoining those Lammas lands to enjoy them temporarily on paying an annual sum to the poor, and the Earls of Leicester paid 3*l.* per annum for many years for the Lammas of the site on which Leicester House stood and the garden and field which are thus described in the entries in the parish books: "The Lammas of the ground whereon his lordship's garden is and whereon his lordship's house stands, and for the field before the house." This latter was what is now the enclosure of Leicester Square. No trace, however, of such payments, is to be found in the parish books since the year 1677.

The earldom became extinct by the death of Joceline, the last earl, about the middle of the last century, when the estate descended upon two ladies (the daughters of Thomas Sidney, a younger branch of the family) one of whom became Lady Sherard, the wife of Sir Brownlow Sherard, and the other became Mrs. Perry. They held the property in undivided moieties as parceners, and at that time it consisted of the family mansion house and gardens, and numerous houses in the square and the streets adjoining.

2. In 1772 the undivided moiety of Dame Mary Sherard of and in the above mentioned hereditaments and premises had become the property of Sir George Yonge, Bart., and was conveyed by him to James Stuart Tulk, the ancestor of the present plaintiff, in fee.

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3. At the time of this conveyance certain leases, which had been granted of the dwelling houses aforesaid by Dame Mary Sherard and Elizabeth Perry, on payment of a premium and reserving a small ground or nominal rent, were in existence.

4. James Stuart Tulk died in 1775, having by his will, of the 13th of May, 1775, devised his undivided moiety of and in the said hereditaments and premises to his son James Stuart Tulk for life, remainder to his first and other sons in tail male, remainder to his (the testator's) son John Augustus Tulk for life, remainder to his first and other sons in tail male, with divers remainders over.

5. Elizabeth Perry died in 1773, having by her will of the 28th of August, 1773, devised her undivided moiety of and in the said hereditaments and premises to Henry Streatfield and Paul George Elers, in fee, upon certain trusts in the will mentioned.

6. In 1786, a bill was filed in the Court of Chancery by Henry Streatfield and Paul George Elers against James Stuart Tulk, the son, and Charlotte his wife, John Augustus Tulk, and other persons in remainder under the will of James Stuart Tulk, the testator (including Charles Augustus Tulk, the son of John Augustus Tulk and the first tenant in tail in remainder in esse), and also against certain incumbrancers of the moiety of Elizabeth Perry, praying that a commission might issue to make a partition of all the hereditaments and premises aforesaid, therein described as "a certain piece of ground called Leicester Fields, and of a great number of messuages and dwelling houses built upon the same, and also of other messuages or dwelling houses and hereditaments situate in Leicester Fields, Leicester Street, Lisle Street, Sidney's Alley, and other places in the parishes of St. Martin's and St. Ann's, in the county of Middlesex," and that such partition might be made accordingly.

7. By a decree of the then Lord Chancellor in the suit, dated the 15th of May, 1787, it was ordered that a partition should be made of the hereditaments and premises aforesaid in two equal parts, and that a commission should issue for that purpose, directed to certain commissioners, and that one moiety of the hereditaments and premises should be allotted to the plaintiffs and to

the defendants incumbrancers of the moiety of Elizabeth Perry, and that the other moiety thereof should be allotted to the defendants James Stuart Tulk, and Charlotte his wife, John Augustus Tulk, and the said other persons in remainder, to be held and enjoyed by the several parties respectively in severalty according to their respective rights and interests.

8. On the 15th of September, 1787, a commission of partition duly issued, directed to certain commissioners, who, in obedience to the decree, returned the same, and by their certificate, dated the 28th of November, 1788, certified (amongst other things) that they had proceeded to make a fair partition of the hereditaments and premises, and had set apart, and divided the same into two lots, moieties, or equal parts, one of such lots including, with others, the houses and land forming the north side of Leicester Square, and the other of the said two lots, moieties, or equal parts, including, with others, the houses forming the west, south, and east sides of the square, and the square garden; and they further certified that they had allotted and apportioned, as and for the share of the plaintiffs and the defendants incumbrancers of the moiety of Elizabeth Perry, to be held in severalty according to their respective rights and interests therein, the first lot; and had allotted and apportioned, as and for the share of the defendants James Stuart Tulk, and Charlotte his wife, John Augustus Tulk, and the other persons in remainder, to be held in severalty according to their respective rights and interests therein, the second lot, including the "piece of ground called Leicester Square, as the same was then enclosed with iron railings, and kept and used as a garden or pleasure ground." And the commissioners further appointed that the persons to whom the second lot or pieces of ground were allotted should pay to the persons to whom the first lot or pieces of ground were allotted the sum of 300*l.* for equality of partition. And lastly, that the lessees of the several messuages, or tenements, shops, and hereditaments, comprised in the aforesaid pieces or divisions, fronting on the north towards the said square garden or ground called Leicester Square, should remain contributory, and pay to the proprietors of the second of the said two lots or moieties, the several rents or sums of money then by them severally paid for the square tax, or square rent, for and during the continuance

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of the terms then in being in their several leases, towards keeping up the said square or garden; *and that the owners and proprietors of the said second of the said two lots should for ever afterwards, at their own sole and proper costs and charges, keep and maintain the said square garden or pleasure ground, and the railings round the same in sufficient and proper repair as a square garden or pleasure ground, in like manner as the same then was.*

9. By a decree on further directions made in the cause on the 28th of January, 1789, after reciting the certificate at length, it was (amongst other things) ordered that the estates in question in the cause should respectively be held in severalty as allotted by the certificate of partition, and that the parties should execute mutual conveyances to each other of their respective allotments, to be settled by one of the masters of the court.

10. The partition directed to be made by this decree was carried into effect by indentures of lease and release, dated respectively the 4th and 5th of March, 1791, by virtue of which the hereditaments and premises, including the square garden, so decreed to be conveyed to James Stuart Tulk, and Charlotte his wife, John Augustus Tulk, and the other persons in remainder, as their share of the estates in question in the cause (all which hereditaments and premises are hereinafter for the sake of brevity referred to as the "Tulk's moiety" of the estates) and also the several hereditaments and premises so decreed to be conveyed to Henry Streatfield, Paul George Elers, and the incumbrancers of the moiety then late of Elizabeth Perry, as their share of the estates in question in the cause (which last mentioned hereditaments and premises are hereinafter referred to as the "Perry's moiety" of the estates) were duly conveyed to the respective parties accordingly.

The release recited the decree of 1787, the certificate of the commissioners *at length*, and the decree of 1789, and that the parties were desirous of carrying out the latter decree, but it did not contain any covenant on the part of the owners of the second lot to keep up the square garden.

11. Before and at the time of the filing of the bill for partition, the greater part, if not all, of the aforesaid leases which had been granted by Dame Mary Sherard and Elizabeth Perry, were in existence and continued to exist till long after the completion of the

partition, the last of such leases having expired in 1847. Several of such leases contained covenants on the part of the respective lessees to pay (in addition to the annual rent thereby reserved) small yearly sums or rents towards the expenses of keeping up and repairing the garden in the middle of the square, and of lighting and watering the streets lying in the neighbourhood. The leases also contained covenants on the part of Dame Mary Sherard and Elizabeth Perry to apply the square rents to the purposes aforesaid.

At the time of the filing of the bill for partition there were, and still are, six houses on the north side of the enclosure or square, known respectively as 1, 2, 3, 4, 5, 6, Leicester Square. These houses have never belonged to any member of the Tulk family, and the present owners of them are William Hill Fisher, Henry Webb, John Gardner, and Mary Ann Page, all of whom claim a right to have the square reserved as an open and ornamental ground.

12. James Stuart Tulk, the son, died without issue male in 1791, and on his death John Augustus Tulk, the father of the present plaintiff, became entitled as tenant for life to the piece of ground called Leicester Square, and the other lands and hereditaments conveyed therewith by the indenture of the 5th of March, 1791, with remainder to his eldest son, Charles Augustus Tulk, as tenant in tail male.

13. By an indenture dated the 25th of October, 1807, and duly enrolled in Chancery, after reciting that John Augustus Tulk and Charles Augustus Tulk, his eldest son, had entered into an arrangement for a recovery and re-settlement of the said last mentioned hereditaments and premises, the same were conveyed to a tenant to the præcipe for the purpose of suffering such recovery, which it was thereby declared should enure to the uses therein mentioned (that is to say) as to the hereditaments specified in the first schedule thereto (including the hereditaments situate on the east and partly south side of the square, and also the square garden), to uses to confirm certain leases, and subject thereto to the use of Charles Augustus Tulk, his heirs and assigns for ever, and as to the hereditaments comprised in the second schedule thereto (including the hereditaments situate on the west and partly south side of the square), to uses to confirm certain leases, and subject thereto to the

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use of John Augustus Tulk, his heirs and assigns; and by the indenture Charles Augustus Tulk covenanted for himself, his heirs, executors, and administrators, with John Augustus Tulk, his heirs, executors, administrators, and assigns, that he, Charles Augustus Tulk, his heirs and assigns, would, from time to time, and at all times thereafter, keep the piece of ground in Leicester Square then used as a garden (being part of the hereditaments limited to the use of Charles Augustus Tulk, his heirs and assigns), in its then present form and in an open state and uncovered by any buildings upon the same and would keep the said piece of ground then used as a garden in neat and ornamental order.

14. A common recovery of the said hereditaments and premises, as of Michaelmas Term 48 George 3, was duly suffered in pursuance of the indenture of the 25th of October, 1807.

15. At the time of the execution of the last mentioned indenture all the leases of the houses situate on the Perry's moiety of the estates, in which small yearly rents or sums had been reserved for the purpose of keeping up the square garden, had expired. Certain of the leases, however, of the houses situate on the other or Tulk's moiety of the estates were then in existence, and (as already stated in paragraph 11) continued to exist till a much later period.

16. By an indenture of release of the 15th of July, 1808, founded on a previous lease for a year, and made between Charles Augustus Tulk of the one part, and Charles Elms of the other part, Charles Augustus Tulk, in consideration of 210*l.* paid to him by Charles Elms, conveyed the piece of ground, or square garden, or pleasure ground, in Leicester Square, with the equestrian statue then standing in the centre thereof, and the iron railing and stonework round the garden, to Charles Elms, his heirs and assigns, for ever; and by the indenture Charles Elms, for himself, his heirs, executors, administrators, and assigns, entered into a covenant with Charles Augustus Tulk, his heirs, executors, and administrators, in the words following, that is to say:—"That he the said Charles Elms, his heirs and assigns, shall and will from time to time and at all times hereafter at his and their own proper costs and charges keep and maintain the said piece or parcel of ground and square garden and the iron railings round the same in its present form and in sufficient and proper repair as a

square garden and pleasure ground in an open state uncovered with any buildings and in neat and ornamental order, and shall not nor will take down nor permit or suffer to be taken down or defaced at any time or times hereafter the equestrian statue now standing or being in the centre of the said square garden, but shall and will continue and keep the same in its present situation as it now is, and also that it shall and may be lawful to and for the inhabitants of Leicester Square aforesaid, tenants of the said Charles Augustus Tulk and John Augustus Tulk, his father, their heirs and assigns, as well as the said Charles Augustus Tulk and John Augustus Tulk, their heirs and assigns, on payment of a reasonable rent for the same, to have keys (at their own expense) and the privilege of admission therewith annually at any time or times into the square garden and pleasure ground."

17. Charles Elms died in the year 1822, having by his will devised the piece of ground, or square garden, to one Harriet Filewood, her heirs and assigns for ever.

18. Harriet Filewood died in or about the month of May, 1834, having by her will devised the piece of ground or square garden to one Robert Barron, his heirs and assigns.

19. By indentures of lease and release, dated the 27th and 28th of June, 1834, Robert Barron, in consideration of 400*l.*, conveyed the piece of ground, or square garden, unto John Inderwick, his heirs and assigns, and by the indenture of release John Inderwick, for himself and his heirs, executors, administrators, and assigns, covenanted with Robert Barron, his heirs, executors, and administrators, that he, John Inderwick, his heirs, executors, administrators, or assigns, would at all times observe, perform, and keep all and singular the covenants, conditions, and agreements contained in the indenture of release of the 15th of July, 1808, and which thenceforth ought to be observed, and would at all times keep harmless and indemnified Robert Barron, his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, and also the real and personal representatives of Charles Elms and their lands and tenements, goods, and chattels from the performance of the covenants.

20. In the year 1839, the piece of ground, or square garden, was offered for sale by public auction by John Inderwick, and on the

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occasion of such sale a contract for the purchase of the fee simple thereof was entered into by Hyam Hyams for 451*l.* 10s. The benefit of which contract was afterwards duly assigned to Edward Moxhay, his heirs and assigns. On the occasion of the purchase, John Inderwick required Edward Moxhay to enter into a covenant for maintaining the square, similar to the covenant entered into by John Inderwick in the indenture of the 28th of June, 1834, which Moxhay refused to do; Inderwick thereupon declined to complete the said contract for sale.

21. Edward Moxhay thereupon instituted a suit in the Court of Chancery against John Inderwick to compel specific performance of the contract, and a decree was made in the cause referring it to one of the masters of the court to approve of a proper conveyance, and on the hearing of the cause on further directions and on exceptions to the master's report on the 21st of December, 1847, an order was made by the then Vice-Chancellor Knight Bruce, declaring that the plaintiff, Edward Moxhay, was not entitled to a conveyance from the defendant John Inderwick, unless on the terms of giving and providing for him a sufficient indemnity against any breach or breaches by or on the part of Edward Moxhay, his heirs, appointees, or assigns, of the covenant or covenants relating to the property contained in the indenture of release of the 28th of June, 1834, on the part of John Inderwick, with Robert Barron, and declaring that a covenant or covenants on the part of the plaintiff, Edward Moxhay, his heirs, appointees, executors, adminstrators, and assigns, with John Inderwick, his heirs, executors, and administrators, to the same effect, mutatis mutandis, as the covenant or covenants with Robert Barron on the part of John Inderwick, ought to be considered as a sufficient indemnity for the aforesaid purpose if contained in the conveyance from John Inderwick to the plaintiff, Edward Moxhay.

22. Robert Barron, by his will, dated the 28th of June, 1834, devised all his real and personal estate to one Harriet Gibson, and appointed her sole executrix. Harriet Gibson afterwards married one John Gisby.

23. By an indenture dated the 2nd of March, 1848, and made between John Gisby and Harriet his wife, of the first part, Edward Moxhay, of the second part, and John Inderwick, of the third part

(and which indenture was duly acknowledged by Harriet Gisby), John Gisby and Harriet his wife, in consideration of 120*l.* paid by Edward Moxhay, and of his bond of indemnity to John Gisby and Harriet his wife in a penalty of 1000*l.*, at the request of Edward Moxhay, released John Inderwick from the covenant contained in the indenture of release of the 28th of June, 1834, whereby he had covenanted with Robert Barron, his heirs, executors, administrators, and assigns, that he, John Inderwick, his heirs, executors, administrators, or assigns, would perform the covenants contained in the indenture of the 15th of July, 1808.

24. John Inderwick afterwards, in consideration of 361*l.* 4*s.*, conveyed the piece of ground or square garden, without any covenant on the part of Edward Moxhay to the same effect, mutatis mutandis, as the covenant or covenants contained in the indenture of release of the 28th of June, 1834, on the part of John Inderwick with Robert Barron.

25. In 1848, Edward Moxhay, as was alleged, commenced preparations for building on the piece of ground or square garden in contravention of the covenant contained in the indenture of release of the 15th of July, 1808. Charles Augustus Tulk, on the 25th of October, 1848, filed a bill in the Court of Chancery against Edward Moxhay, praying an injunction to restrain the defendant Moxhay from cutting down the trees and shrubs on the piece of ground or square garden, and from pulling down or removing the iron railings round the same, or any part thereof, and from setting up or erecting or continuing on the piece of ground any house, shop, or other buildings, or any scaffolding, hoarding, or board, for the purpose of building, and from taking down, or permitting, or suffering, to be taken down or defaced, the equestrian statue then standing and being in the centre of the square garden, or from doing, or committing, or permitting, or suffering to be done or committed any waste, spoil, or destruction, or nuisance, in or upon the piece of ground and premises, and from altering the then present form of the piece of ground or square garden, or the iron railings round the same.

26. Shortly after the filing of the bill an ex parte injunction was granted to the effect prayed.

27. The defendant Edward Moxhay duly appeared to the bill,

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and answered the same, and in such answer claimed a right to remove the statue, railings, and trees, and to erect buildings on the piece of ground or square garden.

28. In the month of December, 1848, Edward Moxhay moved the Court of Chancery, before Lord Langdale, M.R., to dissolve the injunction, and on the hearing of the motion the Master of the Rolls made an order restraining Edward Moxhay, by an injunction, from converting or using the square garden, or removing the iron railings, in any such manner as might be inconsistent with the use of it as an open garden and pleasure ground.

29. In the same month of December, 1848, Edward Moxhay again moved the Court, before Lord Cottenham, C., to discharge the order, but such motion was refused, with costs.

30. John Augustus Tulk, the father of the plaintiff, died on the 23rd of January, 1845, having by his will devised to his widow, Lydia Tulk, in fee simple, his share of the hereditaments and premises conveyed to him, under and by virtue of the indenture of re-settlement of the 25th of October, 1807.

31. Charles Augustus Tulk died on the 16th of January, 1849, having by his will devised certain hereditaments and premises, comprising (inter alia) certain houses in Leicester Square, facing the piece of ground or square garden conveyed to him under and by virtue of the last mentioned indenture, unto and to the use of George Appleyard and James Meredyth, their heirs and assigns, upon certain trusts therein expressed, for the benefit of Augustus Henry Tulk, Edward Hart Hart, John Augustus Tulk (not the plaintiff), and several other persons, of whom some were then under the disabilities of infancy or coverture.

32. George Appleyard and James Meredyth, having disclaimed and renounced the estates devised to them in trust as aforesaid, letters of administration to the estate and effects of Charles Augustus Tulk, with his will annexed, were granted by the prerogative Court of Canterbury to Augustus Henry Tulk, his eldest son and heir at law.

33. On the 5th of February, 1849, a suit was instituted in the Court of Chancery by Edward Hart Hart and others, against Augustus Henry Tulk and others, for carrying the trusts of the will of Charles Augustus Tulk into effect.

34. Edward Moxhay died on the 19th of March, 1849, having by his will devised the piece of ground or square garden to his widow, Phœbe Moxhay, her heirs and assigns.

35. Previous to and in the month of February, 1851, James Wyld contracted with Phœbe Moxhay for the absolute sale to him in fee simple of the piece of ground or square garden, for the purpose of erecting thereon a building to contain a large model of the globe or earth, such contract was afterwards carried out by two indentures dated respectively the 25th of March, 1851, and the 15th of April, 1851, under and by virtue of which in consideration of 3000*l.* the piece of ground or square garden became vested in fee simple in James Wyld.

36. Lydia Tulk, Augustus Henry Tulk, Edward Hart Hart, and John Augustus Tulk (not the plaintiff) being desirous of preventing the erection of the proposed building on the piece of ground or square garden, gave notice to Wyld of their intention to prevent the same, and in consequence thereof negotiations took place between the parties and Wyld, which resulted in the agreement next hereinafter stated.

37. By articles of agreement dated the 11th of February, 1851, between Lydia Tulk of the first part, Augustus Henry Tulk of the second part, Edward Hart Hart of the third part, John Augustus Tulk of the fourth part, and James Wyld of the fifth part. After reciting (amongst other things) that Wyld had lately entered into an agreement with the devisee and mortgagees of Edward Moxhay, deceased, for the absolute purchase in fee simple of the piece of ground or square garden, but that he had not yet obtained a conveyance, and that the piece of ground or square garden and the iron railings round the same were in a very ruinous and dilapidated state and condition, and in consequence thereof the said Lydia Tulk had given notice requiring the same to be repaired and reinstated in compliance with the covenant contained in the indenture of the 25th of October, 1807, out of the estate of the said Charles Augustus Tulk, but she had agreed to forbear instituting any proceedings therein in the event of such arangement being carried into effect as therein mentioned, and that with a view to the improvement of the state and condition of the said square, the several parties had agreed to enter into the arrange-

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ment thereinafter contained. It was witnessed that Lydia Tulk for herself, her heirs, and assigns, and Augustus Henry Tulk for himself, his heirs, and assigns, and for all persons interested under the will of the said Charles Agustus Tulk, deceased (other than the persons under the age of twenty-one years or other disability), and subject to the sanction of the Court of Chancery being obtained on behalf of all the persons parties to the suit of *Hart* v. *Tulk*, under the age of twenty-one years, or other disability, agreed with Wyld to grant him a licence to set up and erect on the piece of ground or square garden a globe or model of the earth or such other objects of interest therein mentioned as he might think fit subject to the conditions in the said articles expressed, and also licence to maintain the said globe and other erections for the term of ten years from the 25th of April, 1851, provided that neither such articles nor such licence should operate as a waiver of the covenants in the indentures of the 25th of October, 1807, and the 15th of July, 1808, except during the said term and six calendar months after. And it was thereby agreed that in the event of Wyld being permitted to enjoy the premises during the term without disturbance, then if Lydia Tulk, her heirs or assigns should be desirous of purchasing at any time not exceeding one year after the expiration of the said ten years, one undivided moiety of the piece of ground or garden for the price of 500*l*., and of such desire should give six calendar months notice at any time during or within six calendar months after the expiration of the said ten years, then and in such case the said James Wyld would at such period after the expiration of the said ten years, not exceeding one year as should be fixed by such notice and on payment of the said sum of 500*l*., convey and assure one undivided moiety of the said piece of ground or garden, with the equestrian statue, iron railings, curb-stone, and all improvements which should during the said term have been set up thereon (except the said erections and buildings which the said James Wyld might have erected as aforesaid and which he was to be at liberty to take away if minded so to do) to Lydia Tulk, her heirs or assigns, or as she or they should appoint whether or not the other moiety should have been purchased by Augustus Henry Tulk, his heirs or assigns or other the trustees or trustee of the said will of the said Charles

Augustus Tulk, as therein after mentioned. And Wyld entered into a similar covenant with Augustus Henry Tulk as to the other moiety, and with like covenants with other members of the family of the said Charles Augustus Tulk in the event of Augustus Henry Tulk not purchasing. And Wyld covenanted that he would during the term keep the erections and buildings in a neat and ornamental condition, and that if he should not erect the said globe or other erections or should remove the same before the end of the said term, then he would keep such part of the said piece of ground or square garden as should not be used for such erections (or the whole as the case might be) enclosed with an iron railing and stone curb round the same in sufficient repair as a garden and pleasure ground in an open state and uncovered by buildings, and would so restore the same after the expiration of the said term. And the said parties entered into the usual covenants for quiet enjoyment against claims under them, provided that if the sanction of the Court of Chancery should not be obtained thereto the said agreement should be void.

38. On the 31st of March, 1851, the approbation of the Court of Chancery to the agreement contained in the articles of the 11th of February, 1851, was obtained.

The owners of the houses on the north side of the square, viz., 1, 2, 3, 4, 5, 6, mentioned in paragraph 11, were no parties to nor did they consent to the said agreement of the 11th of February, 1851, or to the said James Wyld erecting the said buildings on the square garden; considerable negotiations took place between Mr. Henry Webb, the Tulks, and Wyld, but no agreement was come to between them.

39. In pursuance of the licence contained in the articles of agreement of the 11th of February, 1851, Wyld erected upon part of the piece of ground or square garden in Leicester Square, a building containing a large model of the earth or globe, and opened the same and kept the same open for public exhibition during the whole of the period of ten years, from the 25th of April, 1851, and during all such period enjoyed the licence granted to him by the articles of the 11th of February, 1851, without any let, suit, hindrance, or disturbance of any person whatsoever, but without the consent of the owners of the houses on the north side of the square.

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Until shortly before Wyld took possession of the square as aforesaid, the garden had been constantly used as a promenade and place of recreation by such of the inhabitants of the square and their families as chose to apply to the owners for the time being of the enclosure or square garden for keys, and to pay a guinea or a guinea and a half per annum; and if restored to its former state, is still capable of being so used.

40. Lydia Tulk died on the 9th of June, 1851, having by her will dated the 25th of September, 1850, devised the hereditaments and premises devised to her by the will of her late husband, John Augustus Tulk, unto and amongst her son (the present plaintiff) his two brothers and sister in fee.

41. The term of ten years mentioned in the articles of agreement of the 11th of February, 1851, expired on the 25th of April, 1861, and after the expiration of the said term, Wyld sold and disposed of the model of the globe or earth, and subsequently removed the building and other erections set up by him as aforesaid from the piece of ground or square garden and left the piece of ground or square garden without any building or other erection standing thereon save the equestrian statue.

42. During the whole of the period that the building containing the model continued so erected on the piece of ground or square garden, Wyld had, in point of fact, the exclusive possession and control of the garden.

43. During the whole of the last mentioned period Wyld was duly rated in respect of his occupation of the building and premises to the poor and other rates made for the parish of Saint Martin in the Fields, in which the piece of ground or square garden is situate.

44. The plaintiff John Augustus Tulk, as heir-at-law and devisee of Lydia Tulk, by a notice served on Wyld on the 26th of January, 1854, duly exercised his option of purchasing the undivided moiety of the piece of ground or square garden; and accordingly, by an indenture dated the 11th of October, 1861, and made between Wyld, of the first part, the plaintiff of the second part, and Sigismund Stolterfoth of the third part, Wyld, in consideration of the sum of 500*l.*, conveyed the said undivided moiety to such uses as thereby to vest the same in fee simple in the plaintiff.

45. Since the execution of such last mentioned indenture, the property of and in the piece of ground or square garden has continued to be and is vested in the plaintiff and Wyld in equal undivided moieties as tenants in common in fee.

46. In the month of January, 1865, the defendants, the Metropolitan Board of Works, acting in pursuance of the 26 Vict. c. 13, and alleging that the said square or garden in Leicester Square was in a dilapidated and neglected state (which for the purposes of the present case is admitted to have been the fact), caused a notice to be set up in the square or garden that they had taken charge of it under the first section of the act. (1)

(1) 26 Vict. c. 13 :—"An Act for the protection of certain garden or ornamental grounds in cities and boroughs." After reciting that "it is expedient to make provision for the better protection and charge of enclosed garden or ornamental grounds which have been set apart for the use of the inhabitants of any public square, crescent, circus, street, or other public place surrounding or adjoining such gardens or grounds in any city or borough,"—enacts, by s. 1, "Where, in any city or borough, any enclosed garden or ornamental ground has been set apart otherwise than by the revocable permission of the owner thereof, in any public square, crescent, circus, street, or other public place, for the use or enjoyment of the inhabitants thereof, and where the trustees, commissioners, or other body appointed for the care of the same have neglected to keep it in proper order, or where such garden or ground has not been vested in or placed under the management of any trustees, commissioners, or other body for the care of the same, and from the want of such care, or from any other cause, has been neglected, the Metropolitan Board of Works, where the same is in any place under their jurisdiction, except the city of London (where the provisions of this act shall be carried into effect by the corporation of the said city), and the corporate authorities in any other city or borough, shall take charge of the same, putting up a notice or notices to that effect in such garden or ornamental ground, and if after due inquiry the person entitled to any estate of freehold in the same cannot be found, or if it shall be vested in any person by whom it is held, subject to any condition or reservation for keeping the same as and for a garden or pleasure ground, or that the same shall not be built upon, but not otherwise, shall cause any buildings or other encroachment made therein within the period of twenty years before the passing of this act to be removed, and (if requested by a majority of two-thirds of the owners and of the occupiers of the houses surrounding the same) shall vest such garden or ornamental ground in a committee consisting of not more than nine nor fewer than three of the rated inhabitants of such houses to be chosen annually by such inhabitants, in order that the same may be kept as a garden or ornamental ground for the use of such inhabitants; and the vestry or board of any and every parish or district within which the same or any part thereof is situate shall from time to time cause to be raised the sums required by such committee for defraying the expenses of the maintenance

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47. On the other hand, the plaintiff, contending that, whether the square or garden was in a dilapidated or neglected state or not, the defendants, under the circumstances above set forth, were not authorized or empowered by the act, to take possession of, or interfere with, the square or garden, after having duly served the defendants with a notice of action, commenced the present action of trespass in the month of April, 1865.

48. It is agreed that the Court shall have power to draw all inferences of fact which a jury might properly draw, and shall

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and management of such enclosed garden or ornamental ground, or of such part thereof as is situate within their parish or district, by an addition to the general rate to be assessed on the occupiers of such houses; or if the said owners and occupiers shall not agree as aforesaid to undertake the charge of such garden or ornamental ground, the Metropolitan Board of Works or corporate authority aforesaid shall, within six months after the notice hereinbefore mentioned shall have been put up within the same, or within such further time as the said board or authority may think it expedient to allow for such agreement to be come to, vest the same in such vestries or boards, who shall thenceforth take charge of and maintain the same as an open place or street in such manner as shall appear to them most advantageous to the public, subject to the approval of the Metropolitan Board of Works or corporate authority, as the case may require; saving and always reserving to every person and persons, his and their heirs, executors, administrators, and assigns, all such estate, right, title, and interest, as he, she, or they would or ought to have had and enjoyed of, in, to, from, or out of the gardens and grounds aforesaid in case this act had not been passed."

Sect. 2, "And whereas it is expedient that the same should be carefully protected from undue encroachment, where any right to require that any garden or ornamental ground as aforesaid be kept and maintained as such, or that the same shall not be built upon, shall belong to any person in right of any house or other property, and he shall by notice in writing signed by him addressed to the Metropolitan Board of Works, where the same is in any place under their jurisdiction, except the city of London, where the same shall be addressed to the corporation of the said city, or to the corporate authorities in any other city or borough, requesting the said Metropolitan Board of Works or corporate authority to protect the right before mentioned, the said Metropolitan Board of Works or corporate authority, after due inquiry, may, if they shall think fit, accede to such request, and then and thereupon the right of such person to require that such garden or ornamental ground be maintained as such, or that the same shall not be built upon, shall thenceforth be vested in such Metropolitan Board of Works or corporate authority, who shall be fully empowered for and in their own name, to exercise all the rights, powers, and privileges in relation thereto, and take such legal proceedings for asserting, defending, and protecting the same, as the said person might have exercised or taken."

likewise decide upon the admissibility in evidence of all deeds, documents, and other matters referred to in the case, provided that copies of all deeds and documents annexed to this case may be read or referred to on either side without objection on the ground of the same not being originals, saving just exceptions to the admissibility of the originals themselves in evidence.

49. The question for the opinion of the Court is whether, under the circumstances above stated, the plaintiff is entitled to maintain the present action. If the Court shall be of opinion in the affirmative, the verdict is to be entered for the plaintiff with 40*s.* damages and costs of suit: if the Court shall be of opinion in the negative, the verdict is to be entered for the defendants upon such of the pleas as the Court shall direct.

Nov. 12. *Sir J. B. Karslake, A. G.*, (*Garth, Q.C.*, and *Pinder* with him), for the plaintiff. Whatever equitable rights there may be between the plaintiff and the owners of the other property round the "square garden" arising from the various dealings with the property as disclosed in the case, there is nothing in the case tending in the slightest degree to shew that the "square garden" has been set apart, either by the irrevocable permission of the owner, or for the use or enjoyment of the inhabitants of the square; and these two conditions must concur before the Metropolitan Board can interfere under s. 1 of 26 Vict. c. 13. At no time have the inhabitants of the square had any use or enjoyment of the garden except by the mere licence of the owner.

Nov. 12 and 15. *Mellish, Q.C.* (*C. Hall* and *Raymond* with him), for the defendants. In order to ascertain the object and intention of the statute, it is necessary to consider what was the state of the law applicable to the subject matter at the time it was passed. As may be seen from the notes to *Spencer's Case* (1), there was great doubt how far a covenant between owners in fee of land could run with the land; and the judgment of Lord Brougham in *Keppel* v. *Bailey* (2), went far to decide that the burthen of the covenant would not run with the land, so that the only remedy at law was by an action against the representatives of the original covenantor;

(1) 1 Sm. L. C. 5th ed. 43. (2) 2 My. & K. 517.

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but there was also a remedy to a certain extent in equity. A court of equity would restrain a purchaser with notice from dealing with the land contrary to the covenant; thus it would restrain the Tulks, and those claiming through them, with notice, as the present plaintiff, from building on the garden; but a court of equity would not go further and enjoin the keeping the garden in ornamental repair; and there was no such thing as a dedication to a portion only of the public, as the inhabitants of a particular square, that could be enforced by indictment. It was to meet this very case that the statute 26 Vict. c. 13 was passed; for the value of a garden in the middle of a square to the inhabitants is very great as a prospect, if they are entitled and can enforce the right to have it kept in an ornamental condition, independently of any right to walk in it. Now, what are the rights of the inhabitants of Leicester Square? First, the owners and occupiers of the north side of the square are entitled in equity, under the decree of partition of 1789, and their leases, to enforce the clause in the certificate as to the maintenance of the garden in proper order (par. 8); and it is immaterial that there is no covenant to that effect in the deed of partition, for the omission of which there was good reason in the fact that the covenant would bind the personal estate of the covenantors, and that some of the parties to the deed were tenants for life only. Secondly, the owners and lessees on the west and part of the south sides are entitled to enforce at law against the representatives of Charles Augustus Tulk, and in equity against the plaintiff and Wyld, the observance of the covenant in the deed of 1807 (par. 13); and it is immaterial in equity, that the plaintiff is one of the tenants in common of the property to which the benefit of the covenant is attached. Thirdly, the owners of several houses in the square are entitled to enforce the covenant made by Elms on the sale of the garden to him (par. 16), in which the enjoyment of the garden by the inhabitants in general is expressly comtemplated.

[COCKBURN, C.J. The covenant is with Charles Augustus Tulk, not with the inhabitants.]

No doubt; but the inhabitants of more than three sides of the square have a direct right in equity, and that is quite sufficient to satisfy the terms of the statute.

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[LUSH, J. I should doubt whether the case were not within s. 2, but I do not see how it is brought within s. 1, so as to give the Board the right to take compulsory possession.]

The two sections apply to the same subject matter, giving only an alternative mode of proceeding. *Tulk* v. *Moxhay* (1), a decision as to this very garden, *Cole* v. *Sims* (2), *Piggott* v. *Stratton* (3), *Western* v. *Macdermott* (4), and the cases collected in the notes in *Spencer's Case* (5), shew that a court of equity would enforce the perpetual observance of covenants like the present, whatever might be the rights of the parties at law, so far as to restrain building on the garden; and there being no such thing known to the law as a dedication to a part of the public, so that a remedy by indictment was impossible, the legislature intended by this statute to supply this want.

The Attorney General, in reply, was stopped by the Court.

COCKBURN, C.J. I am of opinion that this act of parliament does not apply to such a case as the present. Two things are necessary to give the Metropolitan Board jurisdiction and authority within the first section. There must have been a setting apart for the use and enjoyment of the inhabitants, and that must have been done without power remaining in the person setting apart for their use and enjoyment to revoke his grant or permission.

Now, there is no evidence before us, derived from any of the documents or any of the facts stated in the case, that there has been any setting apart for the use or enjoyment of the inhabitants, or any use or enjoyment by the inhabitants, prior to the proceedings in Chancery for the partition between the Perrys and the Tulks; but there is, in the report of the commissioners, appointed by the Court of Chancery with a view to effect that partition, a recommendation that, whereas the piece of ground, consisting of what is popularly called "the square," was to be given to one of the parties who were tenants of the undivided moieties, in fee simple, so as to divest the other party of all interest and estate in it, it should be made a condition that the persons, to whom the

(1) 2 Ph. 774.
(2) 5 D. M. & G. 1; 23 L. J. (Ch.) 258.
(3) 1 D. F. & J. 33; 29 L. J. (Ch.) 1.
(4) Law Rep. 2 Ch. Ap. 72.
(5) 1 Sm. L. C. 5th ed. at p. 43.

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open ground was under the partition to be awarded, should for ever after keep it in its then state and condition as an ornamental garden. And one can well understand the principle on which this recommendation proceeded. No one can doubt that it was eminently advantageous, as enhancing the value of all the houses that had been built around this open plot of ground, that it should be kept as an open ornamental garden, with a view to the prospect which every house would have over it. No one can doubt that it is much more advantageous and enhances the value of property, to have ornamental open ground before it, rather than to have the prospect, perhaps at a very narrow interval, of so many brick houses in front; and therefore, when Mrs. Perry's representatives were to take a certain portion of the houses built around that garden, it was a very fair term to impose upon the other parties to whom that piece of open ground was to be allotted, that they would keep that as open ornamental ground. But although the decree, as made by the Court of Chancery, is founded on the recommendation of the commissioners, and it may therefore be taken to be decreed by the Court that the party to whom the open ground has been given by the partition shall for ever afterwards keep it as an open ornamental piece of ground, yet I think it is abundantly clear, that no one but the persons claiming under Mrs. Perry acquired thereby any right in equity; certainly no right has been acquired at law under a decree of the Court, not followed up by any covenant; and no one but Mrs. Perry's representatives acquired a right, even in equity, to enforce that part of the decree.

Now, if nobody but those claiming under Mrs. Perry acquired any such right, it is perfectly clear that no one else could apply to a court of equity to enforce it. Therefore, assuming that they, while enforcing that provision, made so far in their favour by decree of the Court, intended that it should enure for the benefit of all the inhabitants, so as to give them the right to treat this as an open piece of ground set apart for the use and enjoyment of the inhabitants as a garden, the next question which presents itself is, whether that right is revocable or not. It is abundantly clear, and Mr. Mellish could not dispute the proposition, that that right to enforce this part of the decree of the Court of Chancery was vested simply in Mrs. Perry's representatives, and consequently that they

could release it; therefore if they, by their act in obtaining a decree of the Court of Chancery, could be said to have set apart, or caused to be set apart, this ground for the benefit of the inhabitants, they could at any time have released it, and therefore have revoked the grant.

Proceeding with the devolution of title, we find that, by the subsequent conveyance made between the Tulks, John Augustus Tulk (who was one of the persons entitled to the undivided moiety, and for whose benefit the partition was made), and his son Charles Augustus Tulk, who had then an estate in remainder upon the expiration of his father's life, agreed to divide the property. They did divide it, and then, as part of the terms of the division of the estate, it was agreed between them that "the square," the open ground, should go to Charles Augustus Tulk, Charles Augustus Tulk agreeing and taking on himself a covenant to keep it as a piece of garden ground, in the same condition as existed before. There, again, the motive is obvious, the rest of the ground surrounding the open ground forming part of what is called Leicester Square became thus divided between the father and the son; and it was important that all the property should still, with a view to enhance its value, have before it the open space of ornamental ground; and therefore the father, while the son takes the open ground, is careful to secure by the covenant that that shall be kept still as open ground, with a view, no doubt, to the benefit of the surrounding property, part of which is to become his. Here again, assuming (although not a single word is said in support of such an intention) that the intention was that the open ground should be kept for the benefit of the inhabitants, both by the decree of the Court of Chancery and the conveyance between the father and the son (to which effect was afterwards given by the recovery); assuming that it was intended to secure to the inhabitants the use and enjoyment of this open ground as a garden, yet, inasmuch as at any moment John Augustus Tulk, the covenantee, could have released Charles Augustus Tulk, the covenantor, from the performance of the covenant, how can it be said that there has been a setting apart of the garden irrevocably?

Again, when Charles Augustus Tulk sells to Elms, it is true we have for the first time mention of the inhabitants of the square,

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that this open ground shall be kept by Elms in the condition of a garden, with a stipulation that he shall at all times allow the inhabitants the use of it as a place of recreation on their paying a reasonable rent; but is that irrevocable? There, again, it is a revocable grant, if it is a grant at all, for it is simply a covenant with Charles Augustus Tulk, of which he could have released Elms from the performance at any time.

I can therefore see no trace of irrevocability. Until we come to the grant or conveyance to Elms of the open ground in 1808, I can see no trace of any mention of "inhabitants," or a reference to the right, or the permission, if I may so call it, for it is rather a permissive right on the part of the inhabitants to use the piece of garden for the purpose of recreation, arising from the covenant, which is attached to or forms part of the conveyance of the property. That cannot be said to be irrevocable: for the person who has secured it to the public or inhabitants of a given district, can at any time release it; and then there would be no obligation on the part of the person to whom the estate has been conveyed to allow the public to have any such use of it.

The case, therefore, seems to me to fail on both points. It fails in shewing that there has ever been any permission to use, or any conveyance to the use and enjoyment (I mean in the popular sense of the word use, not in the legal sense) of the inhabitants, and still less does it shew that there has been any irrevocable permission.

Now, it may be said to what does the first section apply? I think only to a case where there has been what, in the popular sense, may be called a dedication to a portion of the public. It is admitted that is not a phrase that can be used as a term of art in legal phraseology, yet one understands perfectly well what is meant by it. For instance, when a park, or other place of recreation, amusement, and enjoyment has been created in the neighbourhood, sometimes within the precincts, of a large metropolis or city, and has not been vested in others for this purpose, then it would come within the first section. There are many instances of land over which the public enjoy certain rights, the origin of which cannot be traced, and where the trust deed, if it ever existed, has been lost; and there is no person, except the lord of the manor as claiming part of the waste, who asserts any right; it may be a

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place of that description, if it got into a state of neglect or decay, would be within the first section. It is quite plain from the terms that the section does not apply to cases in which there has not been a right created, or a grant which is incapable of being revoked. It may be that the section would apply (I am far from saying that it would, we are not called on to decide the question) in a case where open land is laid out for building purposes, and leased for a long series of years, and a portion of it is kept as open ground, with a view to the benefit of the occupiers of the adjoining houses, and the owner, by the terms of the lease, is not in a condition to revoke what he has so granted until the expiration of the lease. It may be, during the continuance of such term, a place so set apart for the benefit, use, and enjoyment of the inhabitants, may be said to be "irrevocably set apart" as long as the power of revoking the right of enjoyment could not revive, that is, until the end of the term when the lease expired. It may be, that during the interval that the lease continued in force, the Metropolitan Board might, if the open ground fell into neglect, be entitled to use their jurisdiction under this section of the act of parliament. It is not necessary to decide that in a case where all that has ever been done is, that there is a person with whom covenants have been made, which covenants possibly might incidentally be beneficial to the inhabitants, where all that could be done to enforce the right of the inhabitants would be by proceedings instituted by the covenantee, and where the covenantee could at any moment release the covenantor and revoke what had been done, and put an end to any claim, or pretence of right, on the part of the inhabitants. I think such a case cannot possibly be within the terms of the first section.

Whether the case we are now dealing with would come within the second section, is another matter; whether, where the covenantee has power to enforce a right of this kind by virtue of the covenant which has been entered into by the covenantor, the covenantee, with a view to secure to the inhabitants of the district the advantages of this description which the covenant might have been operating to create, could, by applying, according to the provisions of the second section, to the Board, enable them to enforce the covenant. Whether,—if the covenantee were to apply to the Board,

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and say to them, "I desire to secure to the inhabitants by the covenants in question, which has not been observed, the place being in a state of disgraceful neglect and ruin, but I do not want to be at the expense of going to Chancery, or taking proceedings of that kind to enforce the covenants for the benefit of the inhabitants, I call on you to put yourselves in my place, and enforce the right,"—that might be done under the second section, we are not called on to decide to-day, and I will not take upon myself to decide it. All I have now to say is, that I think that the Board have no jurisdiction under the first section, and that the judgment must therefore be for the plaintiff.

MELLOR, J. I am of the same opinion. Although I was not free from doubts in the course of the argument, I have come to the conclusion that the present is not a case within the first section of the act of parliament, unless it could be successfully contended that the decree had an operative effect, and placed the property in a condition different from that in which it would ordinarily have been, so as thereby to confer a right or benefit on the inhabitants of the square. I can see nothing in the dealing between these parties that seems to come within the character of an irrevocable permission. It seems to me that Mr. Mellish has failed to point out, in any of the transactions between the parties, such a state of things as to establish any consent of all the owners which they could not have withdrawn or revoked. In other words, I can see nothing to satisfy me that this land was ever set apart in the sense of this section of the act of parliament for the use of the inhabitants of any public square. On the contrary, it appears to me the benefit or the enjoyment, such as the inhabitants of the square have had, was simply incidental to the dealing of the parties between themselves, and that this dealing was not intended ever to confer any right on the inhabitants. That being the state of things, it appears to me that this is not a case within the purview of the statute, and that there has been nothing like what my Lord has termed "a dedication;" no setting apart for the inhabitants of the square.

LUSH, J. I am of the same opinion. I think the first clause of the statute was intended to provide for the maintenance and

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care of those gardens or ornamental grounds in the squares of certain cities and boroughs, which in a sense belong to the public, but which have been suffered to fall into neglect and decay for the want of care by those whose duty it was to provide for their maintenance. It never was intended to divest the owners of those grounds of any personal beneficial interest they had in them.

Now, the recital having stated it was expedient "to make provision for the better protection and charge of enclosed gardens or ornamental grounds, which have been set apart for the use of the inhabitants of any public square, crescent, circus, street, or other public place, surrounding or adjoining such garden or ground in any city or borough," the first section enacts that, "where in any city or borough an enclosed garden or ornamental ground has been set apart otherwise than by the revocable permission of the owner,"—by which I understand "has been irrevocably parted with, and set apart by the owner,"—in any public square, crescent, and so on, "and where the trustees and commissioners, or other body appointed for the care of the same, have neglected to keep it in proper order, or where such garden or ground has not been vested in or placed under the management of any trustees, commissioners, or other body, for the care of the same, and from the want of such care, or from any cause, has been neglected,"—in these two predicaments, the Metropolitan Board in London may enter on and take possession of the ground, and put it into proper order for the use of the public. All that language seems to import that the original owner of the square has parted with it, and that he in some way or other has given it up for the use of a particular portion of the public occupying the neighbourhood of that particular garden, either by vesting it in trustees, or by maintaining it in some way so as to give the public the right to the use of the garden. The section does not apply to the case where the owner has merely bound himself, as between himself and the owners of the adjoining houses, not to build on the place, when he has not actually given up the use and enjoyment of that place to that portion of the public occupying houses around it.

Under the given circumstances the Board may take possession of the ground, and if, when they have got possession, they find buildings or any other encroachments on it, they are to ascertain

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who is the owner; if they cannot find out who is the owner, they may demolish the building; and if they can find the owner, and find that he is bound not to have the building put there, then they may demolish the building. Then the section goes on to say, having so done they may vest the land in a committee of the inhabitants of the neighbourhood, and if the inhabitants will not have it, it shall be vested in the vestry, who shall keep it in repair.

All that assumes that the owner of the property parted with it irrevocably, and gave up the use of it to the inhabitants of the square, inasmuch as it gives the Metropolitan Board power to vest the property and transfer the property from the owner, and vest it in the inhabitants of the square. It never could have been intended to take away from the owner the beneficial interest which he had in the property.

Now, I do not find in the dealing with this property at any portion of time any arrangement whatever to give a right to the inhabitants of the square, as such, to use the garden. It may be that every one of the inhabitants of the square, by virtue of their property, or by virtue of some arrangement, might have an equitable right to prevent any one building on it. It by no means follows from our judgment, that Mr. Tulk may be at liberty to build on the square garden, that is quite another matter. For aught I know, the persons having property around it may have an equitable right to restrain him from making any other use of it than that which has been done for a great number of years. For aught I know, they may be able to compel him to keep it up as an enclosed garden or ornamental ground. With that we have nothing to do at present. All we have to determine is, whether this is a piece of ground irrevocably set apart for the use of the inhabitants within the meaning of the first section. I am clearly of opinion it is not, and, therefore, the Metropolitan Board were wrong in taking possession under that section.

Judgment for the plaintiff.

Attorneys for plaintiff: *H. W. & N. Coulthurst.*
Attorneys for defendants: *The Solicitor to the Board.*

ALBERT v. THE GROSVENOR INVESTMENT COMPANY, LIMITED.

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Nov. 25.

Bill of Sale, Construction of—"Default" in payment—Parol evidence contradicting Deed—Giving time.

By indenture of the 15th of May, 1865, goods of the plaintiff (called the mortgagor) were assigned to the defendants (called the mortgagees), subject to the proviso of redemption, that is to say, that these presents are on the express condition, that if the mortgagor repay to the mortgagees the sum of 62*l.* by instalments of 2*l.* on Monday, the 22nd instant, and on each of the succeeding Mondays until the whole is fully paid, the bargain and sale shall be void to all intents and purposes; provided also, that if the mortgagor shall make default in payment of the said 62*l.*, or any part thereof, when and as the same shall become due and payable, the whole shall then be immediately due and payable, and it shall be lawful for the mortgagees to take possession of the goods, and sell and dispose of them as they think fit. There was also a proviso that the mortgagees, as long as any of the 62*l.* remained due or unpaid, might enter at any time and take temporary possession of the goods.

The previous instalments having been paid, on Monday, the 28th of August, 1865, the plaintiff's wife asked the defendants' manager to wait till the 11th of September, when she would pay 6*l.*, to which he assented. On the 5th of September the manager wrote saying he should take immediate possession of the goods. On the 7th he took possession of the goods, and left a man in possession. On the same day the plaintiff's wife applied at the defendants' office, and was told to bring 40*l.* on the next Saturday, the 9th, which would cover all claims, and she should have the bill of sale given up; on the Saturday the money was tendered, but she was told as there was no one there authorized to receive it to come again on the Monday before two. On the Monday, the 11th, she tendered the money in due time, but it was refused, and the goods had in the meantime been removed from the plaintiff's house and were afterwards sold. The above facts having been proved, in an action brought to recover damages for the seizure and sale of the goods:—

Held, that the parol evidence was admissible, and showed that there had been no "default" within the meaning of the deed; and that the plaintiff was therefore entitled to recover the value of the goods.

FIRST COUNT, for breaking and entering the plaintiff's house and seizing and converting the plaintiff's goods. (1)

Pleas: 1. Not guilty. 2. The leave and licence of the plaintiff. 3. That the goods were not the property of the plaintiff.

Issue joined.

(1) There was also a special count setting out the bill of sale, and alleging that the defendants had agreed that the instalments to be due on the 28th of August, and 4th of September, 1865, should not be paid till the 11th of September, 1865, and that the defendants, contrary to the arrangement, seized the goods and sold them; but this count was abandoned by the plaintiff's counsel at the trial as untenable in law.

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At the trial before Cockburn, C.J., at the sittings in Middlesex after Hilary Term, it appeared that the defendants had lent 50*l.* to the plaintiff, and that to secure the repayment, together with costs, &c., a bill of sale of the plaintiff's goods by indenture had been executed on the 15th of May, 1865, between the plaintiff (called the mortgagor) of the one part, and the defendants (called the mortgagees) of the other, by which it was witnessed that in consideration of 62*l.* 10*s.* paid by the mortgagees to the mortgagor, the mortgagor assigned, &c., to the mortgagees, and their assigns, all the household furniture, &c., in No. 6, Hereford Place, Peckham, &c., to hold to them, their executors, administrators, and assigns, subject nevertheless to the proviso for redemption of the same, that is to say, provided always, and these presents are upon the express condition, that if the mortgagor shall pay, or cause to be paid, unto the mortgagees the sum of 62*l.* 10*s.*, by the following instalments, that is to say, the sum of 2*l.* on Monday, the 22nd of May instant, and the like sum of 2*l.* on the Monday of every succeeding week, until the entire sum of 62*l.* 10*s.* is fully paid, the bargain and sale or other assurance hereby made shall be void to all intents and purposes. Provided also, and it is hereby declared and agreed, that if the mortgagor shall make default in payment of the said sum of 62*l.* 10*s.*, or any part thereof, when and as the same shall become due and payable according to the provision for that purpose hereinbefore contained, the whole amount of the moneys secured by these presents shall be then immediately due and payable, and it shall be lawful for, but not obligatory on, the mortgagees, their executors, &c., without any further consent or concurrence, and notwithstanding the dissent or non-concurrence of the mortgagor, to take possession of the household furniture, &c., and thenceforth to hold and enjoy the same for their own absolute use and benefit, and also to sell and dispose of the same upon the premises on which they shall be, or at such other place as they shall think proper, in such manner and on such conditions, &c., as they shall think fit. There was also a further proviso that it should be lawful for the mortgagees, &c., their servants, &c., to enter and take possession of the goods wherever they were to be found, at any time whilst any moneys should remain due, and remove the same at their discretion, and also from time to time to

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relinquish possession of them, and again take possession of them, without invalidating the powers given by the deed; and for this purpose to break open any outer or inner door, &c.

The instalments of 2*l.* up to and including that due on the 21st of August, 1865, were regularly paid by the plaintiff. But on the 28th of August the plaintiff, being unable to meet the payment, the plaintiff's wife went to the offices of the defendants, and saw a Mr. Bayne, the secretary, and asked him if he would wait till the 11th of September, on which day she would pay him 6*l.*, and Bayne said he would wait. On the 5th of September, the plaintiff's wife received the following letter from Bayne:—

"Grosvenor Investment Company, Limited.

"Sept. 4th, 1865.

"Information having reached us that Mr. Albert has left his engagement at the International newspaper, I am directed to take possession under the bill of sale in consequence of the default thereon.

"Yours, &c., W. Bayne."

"Sept. 5, 1865.

"And take notice, that unless immediate possession be given to me under the bill of sale, I shall proceed to take forcible possession in due course. W. Bayne."

On the 7th of September, the defendants' agents entered the plaintiff's house and took possession of the goods, leaving a man in possession. The same day the plaintiff's wife went to the defendants' offices and saw a clerk, the only person there, and he told her that if she would bring 36*l.* he would give up the bill of sale; and she promised to bring or send the money on the Saturday (the 9th of September) at the latest. On that day two friends of the plaintiff went to the office and tendered the clerk 40*l.* (the amount which he and Bayne had previously told them would cover everything, and make all right). The clerk told them that Bayne was not in, and that he himself was not authorized to receive the money; but that Bayne would be at the office on the Monday (11th of September), and if they came with the money on that day before two o'clock it would be all right. Accordingly, the 40*l.* was again tendered by the plaintiff's wife at the defendants' offices on the 11th,

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before two o'clock, but it was refused as too late; and in the meantime, during the wife's absence, the whole of the furniture, &c., had been removed from the plaintiff's house by Bayne, and was afterwards sold.

The jury found a verdict for 50*l.*, leave being reserved to move to enter it for the defendants.

A rule was obtained accordingly, on the ground, first, that the evidence given for the plaintiff, for the purpose of shewing that the time was extended for payment of the instalments according to the terms of the bill of sale of the 15th of May, 1865, was not admissible; second, that such evidence did not entitle the plaintiff to recover a verdict, as it merely altered the terms of the bill of sale under seal by parol agreement and without any consideration; third, that Bayne, the secretary of the defendants, was not proved to have any authority to grant time for payment of the instalments, and that no agreement to that effect was made.

Denman, Q.C., and *Horace Lloyd*, shewed cause. It is a fallacy to say that the parol evidence was inadmissible, or that it was used to contradict the deed.

[COCKBURN, C.J. The question is what is a "default" under the deed, and whether the parol evidence did not shew that there had been no default.]

The case may be put in that way. It also may be put thus: there was a mortgage of the goods, but being by indenture executed by both parties, there was what would have amounted, in the case of realty, to a re-demise; and assuming even that there had been a default within the strict letter of the law, the mortgagor remained in possession with the express consent of the mortgagee, so that he was not a mere tenant at sufferance as in the ordinary case of mortgagor and mortgagee, but a tenant at will, for the promise to pay the two instalments was a good consideration, up to the 11th of September: notes to *Keech* v. *Hall* (1); and so far from there being any notice or determination of the will, the consent continued up to two o'clock on the 11th; the plaintiff, therefore, was entitled to maintain the action.

Montagu Chambers, Q.C., and *Hance*, in support of the rule.

(1) 1 Sm. L. C. 5th ed. 505.

The evidence was not admissible: secondly, if admitted, it was inoperative for any purpose, as it merely altered the terms of a deed by parol, and there was no consideration for any new agreement; the Court cannot decide in favour of the plaintiff without contravening the well known rule of law as to the inadmissibility of parol evidence to alter or contradict an instrument under seal: Broom's Maxims, 4th ed. p. 844; *Littler* v. *Holland* (1); *Gwynne* v. *Davy*. (2) The contention of the other side is untenable; if the plaintiff even were, what may be called, tenant to the defendants, there was ample determination of the will in the letters of the 4th and 5th of September. It may also be doubted how far Bayne had authority to bind the defendants by what he did.

COCKBURN, C.J. I have all along been in hopes that we should be enabled to decide in favour of the plaintiff, as the justice of the case requires, without violating, as Mr. Chambers insists we shall, any rule of law. And, after hearing his arguments, I do not think there is any inflexible rule of law to prevent us so deciding. I agree with what Mr. Chambers has said, and I think the cases well decided which he has cited, and which proceeded on the principle that you cannot alter the terms of a deed by an agreement by parol or not under seal. In *Littler* v. *Holland* (1), the plaintiff covenanted by deed to build three houses by a certain day, and it was held that he could not shew that the time had been enlarged by parol. So in the later case of *Gwynne* v. *Davy* (2), a certain time was stipulated for by deed, within which the plaintiff was to produce sulphate of quinine, and it was held, that although the parties had agreed in writing to extend the time, yet, as the second agreement was not under seal, the plaintiff could not avail himself of it. And that is quite according to our law, though I deeply regret that such a result should have been arrived at. This is the case of a mortgage whereby the mortgagor transfers the property in certain goods to the mortgagees, but subject to the mortgagor's right of redemption; and there are certain clauses in the deed, the result of which is, that the mortgagees cannot seize and sell the goods unless the mortgagor makes default in paying the instalments of 2*l*., which he is bound

(1) 3 T. R. 590. (2) 1 M. & G. 857.

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to do on each successive Monday, till the loan is repaid. Now the facts are, that the plaintiff's wife went to Bayne (who must be taken to have had full authority to bind the defendants by what he did, for, on the evidence, I see not the slightest reason to believe any one else ever interfered in the management of the business of the company) and told him that her husband had difficulty in meeting the instalment due on the 28th of August, and Bayne extended the time for the payment of that and the next instalment to the 11th of September. Now, the bill of sale provides that if the mortgagor shall make "default" in payment of the sum of 62*l.* 10*s.*, or any part thereof, the whole amount shall be then immediately due and payable; and it shall be lawful for the mortgagees to take possession of the goods, and to sell and dispose of them. Now "default" must be taken to mean a non-payment by the party bound to pay, without the consent of the parties having a right to waive the payment. And I see nothing which goes to shew that if, by the consent of the person who is to receive payment, the time for payment is extended, the omission to pay within the time specified must be a "default" within the meaning of the word in the bill of sale; and it would be monstrous to hold that it was a default, for the mortgagee might always lead the mortgagor into a snare by consenting that the time for payment should be extended, and then coming down upon him by insisting that there had been a default. And even if money were offered by the mortgagor the next day, and it were accepted by the mortgagee, the result would be the same. "Default" must mean a default where something is not done by the mere act of omission of the one party, and not an omission with the concurrence of the other party. And in the present case, the voluntary extension of the time by Bayne alters the character of the act of the plaintiff, which would otherwise have been a default.

LUSH, J. I am of the same opinion. I entirely accede to Mr. Chambers's argument, that the terms of a deed cannot be contradicted or varied by parol, and that a parol licence cannot be set up in opposition to a deed. But, then, is that applicable to a case like the present? If the action were brought on a covenant to pay at a certain time, that principle would be perfectly applicable;

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but here the question raised is founded on the proviso; and if the words had been "If the mortgagor shall not pay on the said specified days," he could not have set up the parol enlargement of the time. But the words are, "Provided that if the mortgagor shall make default;" and I think we must put such a reasonable construction as the parties themselves must be presumed to have intended; and I cannot suppose that they intended that if the mortgagees had consented to non-payment, or had given time for a day or more, they should then be at liberty to say, "You have made default." "Default" must mean something wrongful, some omission to do that which ought to have been done by one of the parties, and this cannot be when the omission to make payment has the concurrence of the other party. Therefore I can see no obstacle to our holding that there has been no default. It is true that the defendants were not bound by this licence or giving of time as there was no consideration, and they might have revoked it at any time, and demanded payment of the instalment, and if it had not then been paid, there would have been a default; but instead of taking this course, Bayne treats, at once, the previous omission to pay as a default; but, as I have said, he could not treat that which had been done with his sanction as a default. It is also true that the property in the goods passed by the deed to the mortgagees, but, though it is not specifically said so in the deed, the mortgagor had clearly reserved to him a special property in the goods until he had made default; and he had, therefore, a right of action for seising and selling the goods without default. I also cannot doubt that Bayne had such authority as to bind the defendants by what he did.

Rule discharged.

Attorneys for plaintiff: *Howard, Dollman, & Lowther.*
Attorney for defendants: *Howard Paddison.*

END OF MICHAELMAS TERM, 1867.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXI VICTORIA.

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Jan. 15.

THE QUEEN *v.* IRELAND.

Municipal Borough—Town Councillor—Burgess—Receipt of Parochial Relief—5 & 6 Wm. 4, c. 76, ss. 9, 23.

Parochial relief given to a man's father is not relief to the man himself, within 5 & 6 Wm. 4, c. 76, s. 9, so as to disqualify him under that section as a burgess of a borough, and so under s. 23 as a town councillor.

RULE, calling on the defendant to shew cause why an information in the nature of a quo warranto should not issue to shew by what right he exercised the office of town councillor of the borough of Bodmin, on the ground that the defendant was disqualified from being elected a town councillor by reason of his having, within twelve months before the last day of August, 1867, received parochial relief within the meaning of s. 9 of 5 & 6 Wm. 4, c. 76.

The defendant was elected a town councillor on the 1st of November, 1867, being at that time on the burgess roll which was completed in the previous October; and the relator made affidavit

that he was "informed and believed" that the defendant had been sworn in and accepted the office.

The defendant's father had been in the receipt of out-door relief from the Barnstaple Union for some time previously, and up to December, 1866. The defendant had never been asked to support his father until that date, when the defendant caused his father's name to be removed from the books of the union.

Section 23 of 5 & 6 Wm. 4, c. 76, enacts that no person "shall be qualified to be elected or to be a town councillor of any borough, who shall not be entitled to be on the burgess list of such borough;" and s. 9 provides that no person "shall be enrolled as a burgess in any year, who, within twelve calendar months next before the last day of August, shall have received parochial relief or other alms," &c.

Baylis shewed cause. There are two preliminary objections to the rule. First, the defendant's name being on the burgess roll at the time he was elected a town councillor, it is too late now to make the objection that he was disqualified: *Ex parte Hindmarch.* (1)

[BLACKBURN, J. In that case, the Court in the exercise of its discretion might well think that the lapse of time was a ground for not interfering, the election of town councillor, in that case, being in August and the burgess roll having made up in the October of the previous year. In the present case the burgess roll had only been completed a week or two before the election in November.

LUSH, J. The 7 Wm. 4, & 1 Vict. c. 78, s. 23, limits the time for an application against a burgess or other municipal officer to twelve months after his election.]

The relator might have objected and had the defendant's name struck off the burgess roll, if the objection is tenable, at the revision in October. Secondly, the relator only swears as to his information and belief that the defendant was sworn in and accepted the office; this is insufficient: Corner's Crown Practice, p. 184.

[BLACKBURN, J. Surely there are cases which decide that swearing as to information and belief as to the acceptance of office is sufficient, if uncontradicted by the other side: because the matter is so completely in the knowledge of the defendant. (2)

(1) Ante, p. 12.

(2) See *Rex* v. *Harwood*, 2 East, 177; *Rex* v. *Slythe*, 6 B. & C. 240.

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COCKBURN, C.J., intimated that the Court desired to hear the defendant's counsel on the main question.]

Relief no doubt has been given to the father within the twelve months, but that is not parochial relief to the defendant within s. 9 of 5 & 6 Wm. 4, c. 76. The father was not living with the defendant, if indeed that fact would have made any difference. There is no legal obligation on a son to support his father, so that it is impossible to say that relief to the father was relief to the son.

The Court then called upon

Pinder to support the rule on this point. Relief to the father is relief to the son. This has always been held by parliamentary committees: Rogers on Elections, 10th ed. pp. 184-5. It is true that the case of *Trotter* v. *Trevor* (1), a decision under the similar section (s. 36) of 2 Wm. 4, c. 45, seems to the contrary, but the grounds of the decision are not given.

[BLACKBURN, J. In the report of that case in 13 C.B. (N.S.) at p. 50, there is a short judgment of Erle, C.J., which seems directly against the relator's contention :—"I see nothing in the 36th section of the Reform Act to disqualify this voter. He is supporting himself by honest industry. His father, being old and destitute and unable to work, becomes for a time an inmate of the workhouse, and the guardians of the union call upon the son to pay something towards his maintenance, and they assess the amount at 1*s.* 6*d.* per week, which is duly paid by the son. It is said that because the support of the pauper costs the parish funds more than the sum so paid, the excess must be considered parochial relief given to the son, inasmuch as it relieved him from a burthen which was cast upon him by the law. I cannot concur in that view."]

The son is bound to support his father by 43 Eliz. c. 2, s. 7.

[COCKBURN, C.J. Only under an order of justices; there is merely a moral duty until the order has been obtained.]

Bancroft v. *Mitchell* (2), shews that it is a positive duty, the neglect of which subjects the son to penal consequences.

COCKBURN, C.J. The matter is really too clear for argument. There is nothing in the act of parliament which directly, or by

(1) 32 L. J. (C.P.) 59. (2) Law Rep. 2 Q. B. 549.

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implication, makes parochial relief to the father relief to the son. I doubt very much indeed, even if the father were living with the son so as to constitute one of his immediate family, relief to the father would be relief to the son, à fortiori it cannot be so when the father is living at a distance. Children are not bound by law to support their parents, except under the obligation imposed by the statute of Elizabeth, and that is only under an order of justices, who have to inquire into the respective position of the parties.

BLACKBURN, J. I am of the same opinion. The Poor Law Act, 4 & 5 Wm. 4, c. 76, s. 56, enacts that from and after the passing of the act all relief given to or on account of the wife, or children under the age of sixteen, shall be considered to have been given to the husband or father of such wife or children; and that seems by direct implication to shew, if it be not a legislative declaration, that relief given to the father shall not be relief given to the son. I do not think before the act relief to the father could be said to be relief to the son, and it certainly cannot be said to be since.

MELLOR and LUSH, JJ., concurred.

Rule discharged with costs.

Attorney for relator: *G. C. Philbrick, for P. J. Wallis, Bodmin.*
Attorneys for defendant: *Rogers & Son, Helston.*

BAILEY AND OTHERS *v.* BOWEN.

Jan. 17.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict.* c. 134), s. 192—*Deed of Inspectorship—Inequality—Reasonable provisions—Release.*

A deed of inspection, under s. 192 of 24 & 25 Vict. c. 134, provided:—1. That the inspectors should from time to time pay a dividend to the creditors, and should retain a sufficient sum for the purpose of paying a rateable dividend to any creditor who should not have executed the deed, and should pay such dividend to such creditor upon his request in writing. 2. That it should be lawful for the inspectors to authorize or require the debtor to enter into or undertake any new contract in the way of his trade or business, which the inspectors might think likely for the benefit of the creditors. 3. That if any creditor should, whilst the deed was in force, commence any action against the debtor, the deed

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should have the same force as an order in discharge in bankruptcy, and should accordingly be pleadable in bar. And the creditors covenanted that when the inspectors should, in writing, certify that the liquidation provided by the deed had, as far as possible, been concluded, or that the debtor had made a conveyance of his estate and effects, according to his covenant in that behalf, then such certificate should be conclusive evidence of the facts therein certified, and upon the giving of such certificate the debtor should be absolutely released from all his debts:—

Held, 1. On the authority of *Hernuliwicz* v. *Jay* (6 B. & S. 697; 34 L. J. (Q.B.) 201) that there was no inequality between the assenting and non-assenting creditors. 2. That the deed being one of inspection, for the winding up of the estate, it might be necessary to enter into new contracts, and the deed was therefore not beyond the scope of the section; and on the authority of *Re Richmond Hill Hotel Company* (Law Rep. 4 Eq. 566) the Court would not decide as to the reasonableness of arrangements assented to by a majority of creditors. 3. On the authority of *Corner* v. *Sweet* (Law Rep. 1 C. P. 456) that the deed was pleadable in bar as a defence to the action.

DECLARATION by drawers against acceptor of a bill of exchange.

Plea setting out a deed under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), for the inspection, management, and winding up of the defendant's estate:—The deed was made between the defendant, a shipowner, of the first part, W. Green and R. W. Morris, inspectors, of the second part, and the several persons, companies, and partnership firms, who, at the date thereof, were creditors of the defendant, of the third part, and it contained a licence to the defendant to conduct, manage, and wind up his business, &c., under the control of the inspectors, with the usual covenants by the debtor, and declared that the moneys should be applied towards the payment rateably and without preference, of all the debts due from the debtor to the creditors. The deed, inter alia, contained the following clauses:—That the inspectors might from time to time pay a dividend to the creditors on account of their debts: "Provided that in case any dividend or dividends shall be declared before all the creditors shall have executed or assented to the deed, or before the amount of dividends payable on all their respective debts shall have been ascertained, the said inspectors or inspector shall retain or direct the retention of a sufficient sum or sums for the purpose of paying a like rateable dividend to any creditor or creditors who shall not have executed or assented to the deed, or the amount of dividend payable on whose debt shall not have been ascertained, and shall after-

wards pay or cause to be paid such dividend to such creditor or creditors upon his or their request in writing, or on the amount of dividend payable on his or their debt being ascertained." . . . "And that it shall be lawful for the inspectors or inspector either to continue, complete, and carry out any contract or contracts (whether by way of charterparty or otherwise) which the debtor may have already entered into, or to discontinue, abandon, and put an end to the same; and it shall be lawful for the inspectors to authorize or require the debtor to enter into or undertake any new contract or contracts in the way of his trade or business, which the inspectors may think likely for the benefit of the creditors, and it shall be lawful for the inspectors from time to time to make advances out of the money in hand belonging to the estate for the purpose of carrying out any contract, the continuance or undertaking of which they shall require." . . . "And that if any of the creditors shall at any time hereafter, whilst these presents are in force, commence or prosecute any action, suit, or other proceeding against the debtor, in respect of their respective debts, claims, or demands, these presents shall have the same force and effect as an order of discharge granted to the debtor under an adjudication in bankruptcy against him, and shall and may accordingly be pleadable in bar to and as a defence or answer to any such action, suit, or other proceeding; and in pursuance of the said agreement in this behalf and in consideration of the premises, the creditors do hereby for themselves respectively covenant with the debtor that if and when the inspectors shall in writing under their hands certify that the winding up, realization, and liquidation provided for by these presents have as far as possible been concluded, or that the debtor has made a conveyance and assignment according to his covenant (which last mentioned certificate the inspectors shall be bound to give immediately on such conveyance or assignment being made) then, and in either of such cases, such certificates shall be conclusive evidence of the facts therein certified, and immediately upon the giving of such certificate, the debtor shall be absolutely released from all the debts, claims, and demands of the creditors, and these presents shall accordingly thenceforth operate as a defeasance pleadable in bar to, or may be otherwise set up as a defence to, any action, &c." "That in case at any

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time during the continuance of this inspectorship, the debtor shall, in the opinion of the inspectors, have wilfully broken or failed to comply with any of the covenants or agreements therein contained, and on his part to be observed and performed, or shall be adjudged bankrupt, or in case at any time during the continuance of this inspectorship any execution or other process of law shall be issued and enforced against the debtor or his estate and effects, so as, in the opinion of the inspectors, to interfere with the arrangements hereby contemplated, then, and in any of such cases, it shall be lawful for the inspectors by writing under their hands, to declare these presents at an end, and thereupon these presents, and every clause, covenant, matter, and thing therein contained, so far as the same tends to restrain the creditors from suing for their debts, shall cease and determine, and the creditors shall thenceforth be at liberty to sue for or prove for the full amount of their respective debts or claims, except so far as they may have previously received the same from other sources than under these presents; and if any dividend shall previously have been paid under those presents, the creditor who shall have received such dividend shall account for the same, but without any liability to refund the same, and shall be admitted as a creditor for the balance only of his debt or claim after deducting the amount of the dividend received."

Demurrer and joinder.

Nov. 8. *Kemplay*, in support of the demurrer. The deed is bad on three grounds. First, the clause enabling the inspectors to retain the dividends of those creditors who do not execute the deed, requires the creditors, before receiving their dividends, to send in a request in writing for its payment. This provision places the creditors who execute in a different position from those who do not. The deed, therefore, gives an advantage to one class of creditors to the prejudice of the other, and is bad. Secondly, the deed cannot be pleaded in bar, as it contains no absolute release, but a mere temporary bar to an action. If the clause, that the deed should have the same effect as an order of discharge under an adjudication in bankruptcy against the debtor, had stood by itself, it might have been good, but that clause is qualified by the covenant which follows and restrains the operation of the release

until the certificate has been given. In *Wood* v. *De Mattos* (1), it was clearly the intention of the parties that the deed should be valid in any event; for no provision was made for the avoidance of the deed: but in the present case it is expressly provided that the inspectors shall have power to put an end to the deed, and to remit the creditors to their original rights. Thirdly, the provision that the debtor may enter into new contracts is unreasonable. The object of the deed is to wind up the business, but the effect of this clause would be to keep it going; it is inconsistent with the object of the deed to carry on the business. The provision empowers the debtor to enter into new contracts, not for the management and winding up of his estate, but in the way of his trade to an unlimited extent; so that he might embark all the assets and change the character of the estate. In *Irving* v. *Gray* (2), a clause that advances might be made in respect of contracts already commenced by the trader, was held not to invalidate a deed; and so in *Strick* v. *De Mattos* (3), the clause was confined to existing contracts; but the present clause goes much further; moreover, this objection to the deed was not taken in those cases.

Lord (*A. L. Smith* with him), contrà. As to the first objection. In order to render a deed void on the ground of inequality, there must be some substantial difference in the advantage which one class of creditors obtain over the other, a slight additional trouble imposed on one class is not sufficient: *Hernuliwicz* v. *Jay*. (4) As to the second objection, that the release is no bar unless it be absolute, *Corner* v. *Sweet* (5) is directly in point. It was there held, on the authority of *Gibbons* v. *Vouillon* (6), that a release similar to the present might be pleaded in bar. With regard to the last point, it is reasonable that in a deed of inspectorship the inspectors should have power to enter into new contracts for winding up the estate, and the Court will not presume that the inspectors would act in a manner injurious to the creditors: *Greenberg* v. *Ward*. (7) Whether the clauses are reason-

(1) Law Rep. 1 Ex. 91. 12 Jur. N.S. 78
(2) 3 H. & N. 34; 27 L. J. (Ex.) 273. 4 Jur. N.S. 380
(3) 3 H. & C. 22; 33 L. J. (Ex.) 276. 10 Jur. N.S. 753.
(4) 6 B. & S. 697; 34 L. J. (Q.B.) 201.
(5) Law Rep. 1 C. P. 456.
(6) 8 C. B. 483.
(7) Law Rep. 1 C. P. 585.

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able or not, is a question entirely for the creditors, and one which the Court will not entertain: *In re Richmond Hill Hotel Company.* (1) If the provisions of the deed are doubtful, or capable of two constructions, they must receive that which makes them reasonable and good: *Strick* v. *De Mattos.* (2) It may be greatly to the advantage of the creditors that new contracts should be entered into. In *Strick* v. *De Mattos* (3), the deed contained clauses in substance similar to the present, and no objection was taken to them, and the deed was held valid.

Kemplay, in reply. The objection is not that a power to enter into new contracts is not reasonable, but that it is not within the scope of s. 192, which provides for the winding up of estates. In *Strick* v. *De Mattos* (2) it was assumed to be within the scope of the statute. A deed which provides for carrying on an estate for the benefit of creditors is not a deed for winding up the estate. In *Corner* v. *Sweet* (4) there was an absolute provision that the deed should operate for ever as a discharge in bankruptcy, and not for a limited time; here the discharge is qualified: for in certain events the deed is void. The release to be pleadable in bar must be absolute: *Belshaw* v. *Bush* (5); *James* v. *Williams* (6); *Walker* v. *Neville.* (7)

Cur. adv. vult.

Jan. 17. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.), was delivered by

MELLOR, J. In this case, an action had been brought by the plaintiffs against the defendant, on an overdue bill of exchange, drawn by the plaintiffs upon, and accepted by, the defendant. To the declaration in the usual form the defendant pleaded, in bar to the action, the provisions of a deed entered into between himself and his creditors, under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), for the inspection, management, and winding up of his estate. The deed in question is set out at length in the plea, which was demurred to by the plaintiffs, and, upon the argument three objections were urged by the counsel for the plaintiffs.

(1) Law Rep. 4 Eq. 566.
(2) 3 H. & C. 22; 33 L. J. (Ex.) 276.
(3) 3 H. & C. at p. 29.
(4) Law Rep. 1 C. P. 456; 12 Jur. N. S. 456, 413; 14 Jur. N. S. 753.
(5) 11 C. B. 191; 17 Jur. 867.
(6) 13 M. & W. 828.
(7) 3 H. & C. 403; 34 L. J. (Ex.) 73. 11 Jur. N. S. 246

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First, it was contended that by the provisions of the deed the non-assenting creditors were placed at a disadvantage as compared with the assenting creditors, inasmuch as they were required to make a request in writing for the payment of the dividend which should be ascertained to be due to them, whereas no such condition was imposed upon the assenting creditors. We intimated, during the argument, our opinion that there was nothing in this objection, and, indeed, it appears to be decided by a case in this Court of *Hernuliwicz* v. *Jay*. (1)

Secondly, it was contended that the deed contained no release, or accord and satisfaction, which could be pleaded in bar to the action, and that the provisions of the deed amounted only to a temporary bar or suspension of the plaintiffs' claim. The provision of the deed as to this matter is in substance identical with that set out in *Corner* v. *Sweet* (2), and the objection appears to us to be disposed of by that case, of which we entirely approve.

The only objection made by the plaintiffs' counsel which induced us to take time for consideration was, that the deed was not within s. 192 of the 24 & 25 Vict. c. 134, inasmuch as it contained provisions enabling the defendant, at the request of the inspectors, to enter into new contracts in the way of his trade, and authorizing the inspectors to advance moneys in hand belonging to the debtor's estate for the purpose of carrying out such contracts.

The language of s. 192 requires that a deed which is within the statute must relate "to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding up of his estate." It is obvious that there are trades of such a nature, that the mere winding up and distribution of the debtor's estate could only be done at an unreasonable and unnecessary sacrifice, and in which the power to enter into new contracts might be of essential importance to the interest of the creditors; the provision in question might, therefore, be a most reasonable provision to be inserted in such a deed, and unless it be beyond the purview of the statute, its reasonableness is a matter for the determination of the assenting creditors. The words of s. 192 are not confined to the distribution and winding up of the estate simpliciter, but include the inspection and management of it.

(1) 6 B. & S. 697; 34 L. J. (Q.B.) 201. (2) Law Rep. 1 C. P. 456.

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It appears to us that, construing the provisions of the deed in question fairly, they merely authorize the inspectors to require the debtor to enter into new contracts for the purpose of thereby better managing, realising, and winding up the estate. The advance of money authorized to be made by the inspectors to the debtor, is confined to the enabling him to carry out such contracts as shall have been by them required to have been entered into for the benefit of the creditors.

Provisions of an analogous character appear to have been contained in the deed which was under the consideration of the Court in *Strick* v. *De Mattos* (1), and in *Wood* v. *De Mattos* (2), in which cases the deeds were held good. It is true, as was pointed out by Mr. Kemplay, that the objection does not appear to have been under the consideration of the Court of Exchequer, or of the Court of Error, and there is a slight difference in the language of the two deeds, but in substance we think they are not distinguishable. Without, however, relying upon the authority of those cases as governing the present, we think that, giving a reasonable interpretation to the language of the provisions under consideration, the deed is not beyond the true meaning of the section, and that the reasonableness of the provisions themselves was a matter for the consideration of the creditors.

In a recent case, *In re Richmond Hill Hotel Company* (3), the Lord Justice Lord Cairns held, affirming a decision of Wood, V.C., that there being no inequality as between creditors, and no fraud, the Court would not judge as to the reasonableness of the arrangement between the debtor and his creditors. In like manner we think we are not called upon to decide on the reasonableness of the provision in question, there being no inequality as between the plaintiffs and the assenting creditors.

Our judgment must, therefore, be in favour of the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *Gregory & Co.*

Attorneys for defendant: *Lawrance, Plews, & Boyer.*

(1) 33 L. J. (Ex.) 270; 3 H. & C. 22. (2) Law Rep. 1 Ex. 91.

(3) Law Rep. 4 Eq. 566.

THE QUEEN *v.* McCANN AND ANOTHER. 1868

Jan. 18.

Poor-rate—Exemption of the Crown—Bridge in occupation of Commissioners of Works and Buildings—43 Eliz. c. 2, s. 1.

The Commissioners of Works and Buildings were incorporated under certain acts, and empowered to construct a bridge at Chelsea, and to borrow from the Treasury 120,000*l.* on an assignment of the tolls. The commissioners were authorized to take tolls, which were to be applied in payment of the expenses of the bridge, and afterwards in repayment of the sum borrowed:—

Held, that the commissioners were not liable to be rated to the relief of the poor, as they were in occupation of the bridge as servants of the Crown, deriving no benefit from the receipt of tolls, and were therefore exempt from the operation of 43 Eliz. c. 2, s. 1, as explained in *Jones* v. *Mersey Docks* (11 H. L. C. 443; 35 L. J. (M.C.) 1).

cited post p. 677 in Ch.

MANDAMUS to two justices of Middlesex, commanding them to issue their warrant to levy by distress and sale of the goods and chattels of the Commissioners of Works and Buildings the sum of 101*l.* 11*s.* 3*d.*, being the amount due on the 25th of October, 1866, in respect of a poor-rate made upon them on the 29th of March, 1866, in the parish of St. George, Hanover Square, in the county of Middlesex.

The writ recited that by the 9 & 10 Vict. c. 39, it was in that act, amongst other things, recited that the commissioners appointed to inquire into and consider the most effectual means of improving the metropolis, and of providing increased facilities of communication between the same, did, by their report, recommend the construction of a suspension bridge across the river Thames between Battersea and Vauxhall bridges, from a point near Chelsea Hospital on the north side to a point near the public-house called the Red House on the south side, and that the Commissioners of Woods, Forests, Land Revenues, Works, and Buildings, had caused surveys, plans, and designs to be made of the intended bridge and the approaches thereto, and that such surveys, plans, and designs had been approved by the Commissioners of Her Majesty's Treasury; and that by s. 1 of the 9 & 10 Vict. c. 39, it was enacted that the Commissioners of Woods, Forests, Land Revenues, Works, and Buildings for the time being were to be and were constituted a corporation by the name and style of "The

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Commissioners of Her Majesty's Woods, Forests, Land Revenues, Works, and Buildings," in order to enable them to execute and carry into effect the several powers and purposes of that act, and amongst such powers and purposes the present purpose of building the bridge; and that by s. 2 the Lord High Treasurer, or the commissioners for executing the office of Lord High Treasurer, were empowered, for the purposes of that act, to authorize the Commissioners for issuing Exchequer Bills for Public Works to advance and lend to the commissioners for executing such act any sum or sums of money in exchequer bills not exceeding in the whole the sum of 120,000*l.*, the repayment of such advances to be secured by an assignment of amongst other tolls and moneys the tolls of the said bridge thereinafter authorized to be taken, which tolls the commissioners for executing such act were thereby empowered to assign accordingly; and that by s. 3 the commissioners for executing the act were empowered to construct and complete a bridge across the river Thames, at the place and from and to the respective points hereinbefore mentioned, with convenient approaches thereto, together with convenient piers, stair-heads, and landing places in manner and according to the surveys, plans, and design as aforesaid; and such bridge, when so erected, together with the approaches thereto, were to be kept in repair by the commissioners for executing such act out of the tolls and other moneys coming to them under such act; and that by s. 64 the commissioners for executing such act were empowered to erect toll-gates on the said bridge, and to take certain tolls at such gates for foot passengers, or any horse, mule, ass, or other beast, or any coach, cart, or other vehicle; and that by s. 112 all tolls received by virtue of such act were to be applied by the commissioners in payment of all expenses of the management and collection of the tolls, and in the next place, in keeping and maintaining, amongst other structural works and improvements, the bridge, and in the next place in payment of all advances, costs, and other expenses made or paid for by the state out of the consolidated fund, or otherwise, in and towards the works and improvements thereby authorized to be made, and the surplus, if any, to form a fund for such metropolitan improvements as the legislature should determine; that by the 9 & 10 Vict. c. 83, the Commissioners of the Issue of Loans for Public

Works and Fisheries for the time being, were empowered to make loans to the Commissioners of Woods, Forests, Land Revenues, Works, and Buildings, for the time being, and also to the said commissioners (who are incorporated by the several acts for effecting improvements in the metropolis) and their successors, in money in lieu of exchequer bills; that, by 14 & 15 Vict. c. 42, s. 22, the duties, rights, and powers of the Commissioners of Woods, Forests, Land Revenues, Works, and Buildings, were vested in the Commissioners of Works and Public Buildings, who were constituted a corporation by that name; and that by the 21 & 22 Vict. c. 66, after reciting that the Commissioners of Works and Public Buildings had borrowed from the Commissioners for the issue of Loans for Public Works and Fisheries the sum of 80,000*l.*, which, together with interest, was still due on the 31st of March, 1858, it was enacted, by s. 1, that so much of 9 & 10 Vict. c. 39, as directed that the surplus tolls should form a fund for metropolitan improvements be repealed, and, by s. 2, that when the sum of 80,000*l.* and interest should have been paid off, no toll should be taken for foot-passengers passing over Chelsea Bridge; and the writ further recited that under the acts above mentioned the bridge had been constructed and completed with convenient approaches, &c., and was opened to the public on the 29th of March, 1858; that the toll gates had been erected, and have since been maintained; and that tolls have been and are taken, and, at the time of the making of the rate, exceeded in amount the cost and expenses of keeping the bridge in repair; and that the Commissioners of Works and Public Buildings, in their corporate capacity were, under the several acts, and not otherwise, beneficial occupiers of the bridge and works appurtenant thereto, and, as such occupiers, were liable to be rated to the relief of the poor of the parish of St. George, Hanover Square; and that the bridge and approaches are situate in the parish of St. George, Hanover Square, and that the vestry of the parish of St. George, Hanover Square, on the 29th of March, 1866, made a rate for the relief of the poor, by which rate the commissioners were assessed as occupiers of the bridge at the sum of 135*l.* 8*s.* 4*d.*, in respect of that part of the bridge which is within the parish, and that payment of 101*l.* 11*s.* 3*d.*, being the proportion of the rate due and unpaid,

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was demanded of the commissioners and payment was refused, and that complaint of the non-payment of the rate was made before justices, who refused to make any order and refused to issue their warrant; and the writ then commanded the justices to issue their warrant.

Return, that the Commissioners of Works and Public Buildings were appointed and constituted under, and that all their rights, powers, duties, liabilities, interests, exemptions, and privileges, in reference to the bridge and works, were conferred and imposed upon them by the several acts of parliament mentioned in the writ; and that, save and except and in so far as the commissioners were or are (if at all) in possession or occupation of the bridge and works, under the several acts, or by virtue of such acts, liable to be rated in respect thereof, the commissioners never were in possession or occupation of the bridge and works, nor had they any beneficial occupation or other occupation of the bridge or works, nor were they liable to be rated in respect thereof as and by the writ is stated; that towards the erection of the bridge and execution of the other works in the 9 & 10 Vict. c. 39, parliament made free or net grants from the consolidated fund to the amount of 127,149*l.* 5*s.* 2*d.*, and authorized loans by the Commissioners for issuing Exchequer Bills for Public Works not exceeding 120,000*l.*, at interest not exceeding four per cent. per annum, and that of the sum of 80,000*l.*, borrowed under the authority in the act 21 & 22 Vict. c. 66 mentioned, not more than 13,500*l.* had been repaid at the time of making the rate, and that towards the payment of that sum not more than 2500*l.* had been received from the tolls and proceeds of the bridge, and therefore the justices adjudged that the commissioners were not, at the time of making the rate, liable to be rated as occupiers of the bridge and works.

Demurrer and joinder.

Keane, Q.C. (*F. T. Streeten* with him), in support of the demurrer. The commissioners are owners of the soil, they receive the tolls and are the beneficial occupiers of the bridge, the case therefore falls within *Jones* v. *Mersey Docks* (1), and the commissioners are liable to be rated. In *Reg.* v. *St. Martin's, Leicester* (2),

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1. (2) Law Rep. 2 Q.B. 493.

11 Jur. N.S. 746.

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it was held that buildings occupied for public purposes fell within the exception to the rule laid down in *Jones* v. *Mersey Docks* (1), and were not rateable; but here the commissioners do not occupy the bridge for public purposes, nor are they servants of the Crown; they are trustees who are to receive the tolls, and apply them according to the statute, and the management of the bridge is a matter purely of local interest.

[BLACKBURN, J. The question is not whether the bridge is occupied for a public purpose, but whether it is de facto in the occupation of the Crown.]

Property of the Crown in the occupation of a person for his own benefit is liable to be rated: *Reg.* v. *Ponsonby.* (2)

[BLACKBURN, J. That case has no bearing on this question. This case is like those where property is occupied by the servants of the great departments of state: *Lord Amherst* v. *Lord Sommers* (3), is a strong authority against the rateability of the commissioners; and so is *Reg.* v. *Shee.* (4) The principle of those cases is left untouched by the decision in *Jones* v. *Mersey Docks.* (1)

MELLOR, J. *De la Beche* v. *Vestrymen of St. James's* (5), which decides that where public works are not made a source of private profit, but their profit is applied to purposes connected with the government, they are not rateable to the poor, is still law.]

Sir J. B. Karslake, A. G., for the defendants (*McMahon* with him), was not called upon.

BLACKBURN, J. The principle which governs this case is very plain. Since the decision relating to the Mersey Docks, as a general rule, the occupier of property from which profit is derived, is to be rated, without regard to the purpose to which the profits are ultimately appropriated; but property in the occupation of the Crown—the Crown not being named in the statute of Elizabeth—forms an exception to this rule: consequently where the Crown is the occupier of property it is not to be rated; and further, where property is occupied for the Crown it is not to be rated. It is on

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.
(2) 3 Q.B. 14.
(3) 2 T. R. 372.
(4) 4 Q. B. 2.
(5) 24 L. J. (M.C.) 74; 4 E. & B. 385.

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this principle that a servant of the Crown, who had taken a lease of premises to be used as barracks, as in *Lord Amherst* v. *Lord Sommers* (1), was held not liable to be rated; and this principle extends to the case of a person in occupation of premises, whether as servant or trustee for the Crown: and so far from being overruled in the case of the *Mersey Docks* (2), this principle was affirmed. The passage from the opinion of the judges in that case which I am about to quote was written by me, and the language I originally used was altered in consultation with the other judges—not because they dissented from what I had written, but because they thought my meaning could be expressed in more accurate language. So that the language of this passage is not theoretically, but practically, the language of the other judges. The opinion, after stating that, where a lease of private property is taken in the name of a subject, but the occupation is in the Sovereign, or her servants on her behalf, the occupation being that of her Majesty, no rate can be imposed, proceeds: (2) "So far the ground of exemption is perfectly intelligible, but it has been carried a good deal further, and applied to many cases in which it can scarcely be said that the Sovereign, or the servants of the Sovereign, are in occupation. A long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of state, such as the Post Office, the Horse Guards, or the Admiralty—in all which cases the occupiers might strictly be called the servants of the Crown—but also to property occupied by local police; to county buildings occupied for the assizes, and for the judges' lodgings, or occupied as a county court; or for a gaol. In these latter cases, it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign so as to make the occupation that of her Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign, so that the occupiers,

(1) 2 T. R. 372.

(2) *Jones* v. *Mersey Docks* (11 H. L. C. at p. 464; 35 L. J. (M.C.) at p. 10.)

though not, perhaps, strictly servants of the Sovereign, might be considered in consimili casu." It was in this latter part of the opinion delivered by the judges that my original draft was altered; this exposition of the law is, therefore, the deliberate act of the other judges, and it is a correct exposition. Mr. Keane's argument is, that the bridge does not fall within the exception here laid down, because the property is not occupied by the servants of the Crown, or for government purposes. But I think neither the old decisions, nor the case of *Jones* v. *Mersey Docks* (1), shew that the bridge is rateable. In this case the legislature have enacted that a bridge shall be built, and instead of its construction being carried out by private enterprise or a private body, that it shall be built by the government out of the public funds. The legislature, therefore, create the Commissioners of Works and Buildings a special corporation for that purpose; they invest them with powers to raise the money and to take tolls; no doubt that would make the occupation primâ facie beneficial, but it is solely and exclusively for repaying the money raised by them and advanced by the government, and if after the advance was paid off there should be a surplus arising from the tolls, it was to be applied to metropolitan improvements in such manner as the government might direct. That application of the surplus is repealed; but it might have been applied to metropolitan improvements without any express sanction from the legislature. Now, should there be any surplus from the tolls, it will have to be held by the commissioners, not for their own benefit, but in trust for the consolidated fund. We have, therefore, a case in which a corporation is created in the servants of the Crown, for executing a private work out of public funds, which, by the theory of our law, has been granted to her Majesty, and is called the consolidated fund. Out of that fund the money is provided for carrying on the work, and into that fund the surplus from the tolls is to go, and consequently this is de facto an occupation by the servants of the Crown. The bridge, therefore, is no more rateable than the private estates of the Crown, such as the Home Park, would be. This is not new law, it is what was decided in *De la Beche* v. *Vestrymen of St. James's*. (2) There the premises were occupied,

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1. 11 Jur. (N.S.) 746.

(2) 24 L. J. (M.C.) 74; 4 E. & B. 385. 1 Jur. (N.S.) 375

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not for government purposes, but as a museum of practical geology, but, de facto, they were occupied by the servants of the Crown, and were permitted to be used as a museum, and consequently they were not rateable. Had there been a private occupation for the purpose of a museum of geology, no doubt the premises would have been liable to be rated.

MELLOR, J. I am of the same opinion. I believe that the decision in the House of Lords was intended to interfere only with those cases in which the occupation of the property was profitable to persons other than the Crown and its servants, and in which although the benefit was ultimately appropriated to public purposes, such as charities and other similar objects, still the property ought to be held rateable because it did not derive an exemption from any principle arising from the construction of the statute of Elizabeth. But that case does not interfere with cases where the property is de facto in the occupation of the Crown. Here, the bridge is built by the servants of the Crown, who for that purpose are constituted a corporation; and though its immediate object is to benefit a particular district, yet it is built entirely with the funds of the Crown, and by the servants of the Crown. And when the bridge is finished, the tolls collected from the passengers are to be devoted to the repayment of the advances; and the surplus, if any, will have to be paid into the consolidated fund. I therefore think the bridge within the principle of the exemption as explained in the opinion of the majority of the judges in *Jones* v. *Mersey Docks.* (1)

LUSH, J. It appears to me that the bridge was a national undertaking. If the bridge were to be rateable, the Post Office and every other similar establishment would be liable to be rated.

Judgment for the defendants.

Attorneys for prosecution: *Capron & Co.*
Attorney for defendants: *The Solicitor to the Board of Works.*

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.
11 Jur. N.S. 746.

MERIVALE, APPELLANT; THE TRUSTEES OF THE EXETER TURNPIKE ROAD, RESPONDENTS.

1868
Jan. 25.

Turnpike Act (3 *Geo.* 4, *c.* 126), *s.* 113, *Construction of—Turnpike Road—Ditches, cleansing and keeping open.*

Section 113 of the 3 Geo. 4, c. 126, enacts, "that ditches, &c., of a sufficient depth and breadth for the keeping of turnpike roads dry, and carrying off the water from the same, shall be made, scoured, cleansed, and kept open, and sufficient trunks, tunnels, &c., shall be made and laid where carriage ways or foot ways lead out of the said turnpike roads into the lands or grounds adjoining thereto, by the occupiers of such lands or grounds," and imposes a penalty in default.

The trustees of a turnpike road, under a private act of parliament, made a road with ditches on either side through the appellant's land; on one side of the road was a bank, portions of which slipped down and filled up the ditch on that side, so that water which came from the appellant's land could not be carried off:—

Held, that the appellant could not be convicted under the above section for not cleansing and keeping open the ditch, as the words "occupiers of the adjoining lands" applied only to the latter part of the section.

CASE stated under 20 & 21 Vict. c. 43.

The appellant was convicted under s. 113 of the 3 Geo. 4, c. 126, for that she being the owner and occupier of certain lands next to and adjoining that portion of the Exeter turnpike road, known as the Cowley Bridge Road, and having received due notice from the trustees of the roads to cleanse, scour, and keep open the ditch, drains, and watercourses of such portion of the road as adjoined her lands, of a sufficient width and depth, so as to carry the water therefrom without obstruction, and keep the same road dry, had failed to do so.

The facts stated in the case, so far as they are material, are, that by the 7 Geo. 4, c. xxv., power was given to the trustees of the Exeter turnpike roads to make, widen and form a new line of road from Cowley Bridge to the Exeter turnpike road, near Stoke Bridge, through and over certain private lands enumerated in the schedule of the act. By s. 40, the trustees were prohibited from making the road through two pieces of land belonging to one John Merivale (through whom the appellant derived her title) without his consent. By indentures dated the 9th and 10th of April, 1830, for a pecuniary consideration John Merivale released

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and granted to the trustees the two pieces of land, with full power "to cut, form, and construct such slopes, banks, or fences for the intended road, out of and upon the adjoining ground and soil on both sides of the intended road." The new line of road was afterwards duly widened and formed, and in forming and widening the road through the lands of John Merivale a wood was cut through, whereby a high slope or bank of from thirty to eighty feet was formed on one side for some little distance. The foot of this high bank or slope was stone fenced by the trustees, in the manner termed "stone ditching," to about four or five feet high, except in three places where, at Merivale's request, it was raised to twelve feet, to protect some trees on the slopes, and a higher fencing with masonry was put up where the road passed a portion of the land purchased by the trustees. This fencing, and also a small portion of the stone ditching nearest to it, was some years after removed by Merivale, and a wall and fence put up by him. The stone ditching was repaired by the trustees some four or five years after it was put up, but has never been repaired by them since. Watercourses were duly formed by the trustees by the sides of the turnpike road. The 7 Geo. 4, c. xxv. has expired, and the trusts have been continued under a new act. From the time the new line of road was constructed no objection to the mode of forming the road and the slopes has been made until the present time. The lands adjoining the banks or slopes (which consist of loose shillet) are not drained, nor is any provision made for carrying off the water falling thereon and preventing the same from running over the slopes. From the water flowing over the slope and the action of the frost the earth is lifted and occasional slips have taken place (where the stone ditching or fencing was put up) and the earth has been carried not only into the water tables, but into and over the road itself. These slips have been removed hitherto by the owner or occupier of the lands. Lately another large slip has taken place, where the original stone ditching remains, whereby not only the watercourse by the side of the road has been filled up and the water unable to pass away, but a portion of the turnpike road itself has been covered and obstructed by the earth and rubbish. The appellant is the owner and occupier of the lands in question, and refuses to

cleanse the ditches for the water to pass, and to remove the earth which has fallen.

The question for the opinion of the Court was, whether the appellant is liable to remove the obstruction occasioned to the water tables and drains by the slip, and to cleanse and open the same.

Hayes, Serjt. (*Lopes* with him), appeared for the respondents, but the Court called on

Coleridge, Q.C. (*Raymond* with him), for the appellant. The question turns on the construction of s. 113 of 3 Geo. 4, c. 126. (1) The trustees of a turnpike road are to make the road and the ditches, which are a part of the road, to carry off the water, and keep it dry; these things are for their benefit, and therefore the duty of making them is cast upon the trustees. The section is divisible into three parts. The first part relates to the making of ditches and drains to carry off the water from the road; this is to be done by the trustees, not by the occupiers of the adjoining lands. The second part relates to the making of tunnels and bridges where carriage ways lead out of turnpike roads into the adjoining lands, and these are to be made by the occupiers of the adjoining lands, because they are required for their benefit; and the third part of the section refers to water passing from the turnpike road through adjoining lands, and the occupier of the adjoining lands is to keep open the ditches through which the water passes from the turnpike road. Here the appellant is convicted for not cleansing a ditch which carries off water which flows from her land

(1) Section 113 of the 3 Geo. 4, c. 126, enacts "that ditches, drains, or watercourses of a sufficient depth and breadth, for the keeping all turnpike roads dry, and conveying the water from the same, shall be made, scoured, cleansed, and kept open, and sufficient trunks, tunnels, plats, or bridges shall be made and laid where any carriage ways or foot ways lead out of the said turnpike roads into the lands or grounds adjoining thereto, by the occupier or occupiers of such lands or grounds, and every person or persons who shall occupy any lands or grounds adjoining to or lying near such turnpike road through which the water hath used to pass from the said turnpike road shall and is and are hereby required from time to time, as often as occasion shall be, to open, cleanse, and scour the ditches, watercourses and drains for such water to pass without obstruction; and that every person making default in any of the matters or things aforesaid, after ten days' notice to him, her, or them given, shall for every such offence forfeit any sum not exceeding five pounds."

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on to the road. The section imposes no duty on her to do this, and she has been wrongly convicted.

[LUSH, J., referred to s. 115.]

Section 66 of 4 Geo. 4, c. 95, empowers the trustees to plant hedges on the side of new roads, and make ditches on either side, for the protection of the fence, and at the expiration of five years the owner of the adjoining lands is to keep up the fence. The ditches mentioned in that section are not made for the purpose of keeping the road dry; s. 67 empowers the trustees to go on adjoining lands to make ditches and drains, and maintain them in good order. These sections shew that the duty of maintaining the road is cast on the trustees; they can go on adjoining lands to cleanse these ditches to carry the water off the road, but the adjoining owners are not to come upon the road and cleanse the ditches to have the water from their lands carried off. The ditches on either side of the road belong to the trustees, and it is necessary to preserve a uniform level to allow the water to run off, but if the adjoining owners of land on a line of road could cleanse and scour the ditches, according to their will and pleasure, it might be a great injury to the preservation of the road.

Hayes, Serjt., in reply. Sections 66 & 67 of 4 Geo. 4, c. 95, have no bearing on this case; s. 66, however, shews that the adjoining owner, five years after the hedge and ditch are made, must maintain them, and as the ditch serves the double purpose of protecting the fence and carrying off the water under that section, it would seem as if the adjoining owner was bound to keep ditches, made under that section, in good order. The important section is s. 113 of the earlier act, and that provides that ditches, drains, or watercourses, shall be made, scoured, cleansed, and kept open "by the occupiers of adjoining lands," and those words govern the whole section, and they are not confined to the making of tunnels and bridges.

BLACKBURN, J. In this case, contrary to my first impression, I think the conviction is wrong. The question depends on the construction of s. 113 of 3 Geo. 4, c. 126, and that section has light thrown upon it by s. 115 and also by ss. 66 and 67 of the 4 Geo. 4, c. 95, which are in pari materiâ with it. It must be

remembered, when a road is made it is desirable that there should be some means of carrying off the water, and this is done by making and keeping open alongside the road a channel in which the water flows, until it comes to some spot where, from the lower level of the ground, the water is carried off in an outlet to the adjoining land. Bearing that in mind, it is easy to understand the intention of the legislature in framing s. 113. The first part of the section enacts "that ditches, drains, or watercourses of a sufficient depth and breadth for the keeping all turnpike roads dry and conveying the water from the same, shall be made, scoured, cleansed, and kept open." If the section had stopped here—this being one of the purposes for which the trustees of the turnpike act are appointed, and it not being said who else is to do these things—it is quite clear it would be the duty of the trustees to make and cleanse the ditches. Then the section proceeds, "and sufficient trunks, tunnels, plats, or bridges shall be made, and laid where any carriage ways or foot ways lead out of the said turnpike road into the lands or grounds adjoining thereto, by the occupier or occupiers of *such* lands or grounds." At first I thought that these words "by the occupier or occupiers of such lands" overrode the whole section, and when it enacted that ditches, drains, and watercourses, shall be made and cleansed, it was meant that they should be made and cleansed by the occupiers of the adjoining lands. But when the words of the section are examined, that is not the grammatical sense, because the words are of *such* lands, and "such lands" in the previous part of the section are lands into which carriage ways or foot ways lead. The section is not happily expressed, but the intention of the legislature would be clear if the word "that" were interpolated, and the section ran "and that sufficient trunks, tunnels, and bridges shall be made," &c. That this is the intention of the legislature is shewn by s. 115, which provides that where any ditches, made, or to be made, under, or at the side of the road, shall be used as well for the conveyance of water from such turnpike road as for conveying water and other matters from houses in a town, and no specific mode of repair or person liable to the expense of maintaining the same is mentioned, the expense of repairing and maintaining such ditches or drains shall be borne and defrayed equally, or in pro-

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portion—not by the occupier of the adjoining land—but by the trustees or commissioners of such turnpike roads, and the inhabitants of the town using the ditches. That shews, I think, very plainly, that the legislature contemplated that the ditch beside the road was to be made and maintained by the trustees, and not by the occupiers of the adjoining land. Therefore, it seems to me that the obligation to make and keep open the drain beside the road, in the first part of s. 113, is cast upon the trustees, and not upon the occupier of the adjoining land. Then comes the latter part of the section, which enacts "that every person who shall occupy any land adjoining to or lying near such turnpike road through which water hath used to pass from the said turnpike road,"—that means that where a drain which runs by the side of a road comes to a spot where the ground is low and there is an outlet, so that the water "hath used to pass away from the turnpike road,"—then "the occupier of the land through which the water hath used to pass away from the turnpike road shall keep open, cleanse, and scour the ditches, watercourses and drains, for such water to pass without obstruction." But in the present case the water is running alongside the road, and does not pass away from the turnpike road into any lands of the appellant. She does not occupy any lands where water passes away; if she did, then she would be obliged to keep the ditches through which it passed open.

Then ss. 66 & 67 of the 4 Geo. 4, c. 95, confirm this construction. The sections make a distinction between a ditch alongside a road, for the purpose of draining a road, and a ditch which is part of a fence: s. 66 enacts that where trustees, in altering a road, make a new fence and a ditch by the side of it, they shall keep them in order for five years, and at the expiration of that time the occupier of the adjoining land shall keep them in order. The ditch is made to protect the fence, and to prevent the cattle on the adjoining land straying on to the road. It is for the benefit of the adjoining owner, and he must, after five years, keep it in repair; that provision has no application to ditches for keeping the road dry. Then s. 67 is a supplement to the latter part of s. 113 of 3 Geo. 4, c. 126. The latter part of that section, as I have already said, according to the construction I put upon it, means that when a drain alongside a road comes to a spot where the water hath used to pass away,

the occupier of the adjoining land shall keep the outlet clear. Section 67 of 4 Geo. 4, c. 95, provides that, where there is no drain, the road trustees, making compensation, may go on the adjoining lands to make one. This section is a supplement to the other, and does not affect this case. I think the justices are mistaken in supposing that the law casts upon the occupier of the adjoining lands any statutable obligation to clean out the ditches; no statutable obligation is cast upon the appellant by s. 113, and, I think, the conviction cannot be supported.

MELLOR, J. I am of the same opinion. It is unnecessary for me, after the elaborate opinion of my Brother Blackburn, to go minutely through the different sections which have been referred to. Section 113 does not apply to the present case; it casts no new obligation on the owners of adjoining lands. When the trustees of a turnpike road make a road, they have to make and cleanse the ditches on either side to keep the road dry; the obligation which is cast on the owners of adjoining lands is to take care that the water, which has been accustomed to flow away from the road on to their land, shall not be obstructed or cast back in the road. I agree that the conviction cannot be supported.

LUSH, J., concurred.

Judgment for the appellant.

Attorney for appellant: *G. E. Philbrick, for Jones & Follett, Exeter.*

Attorneys for respondents: *Dobinson & Geare.*

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Jan. 25.

LYNE, APPELLANT; LEONARD, RESPONDENT.
LYNE, APPELLANT; FENNELL, RESPONDENT.

Salmon Fishery Act, 1865 (28 & 29 *Vict. c.* 121), *ss.* 33 & 36—*Putts, using of without licence—Penalty.*

Section 33 of the 28 & 29 Vict. c. 121, enacts that, "in any fishery district subject to the control of a board of conservators, licences shall be granted at fixed prices to all persons using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill-dams, putts, putchers, nets, or other instruments or devices, except rods and lines, whereby salmon are caught." Section 36 imposes a penalty not exceeding 20*l.* on "any person using any fishing weir, fishing mill-dam, putts, putcher, net, or other instrument or device, not being rod and line, for catching salmon without having a proper licence for the same."

The appellant, who had no licence under s. 33, put down in a salmon fishery seventy putts, with circles in them, that is, wire gratings which could be removed at pleasure, and which, when in the putt, prevented salmon from entering, and alleged he laid down the putts for the purpose of catching shrimps and flat fish:—

Held, that he was liable to a penalty, as it was made unlawful for any person to use putts in a salmon fishery for any purpose without a licence.

CASES stated under 20 & 21 Vict. c. 43.

In the first case, an information was laid by the appellant against the respondent, who occupies a fishery at Undy, in the county of Monmouth, under s. 36 of 28 & 29 Vict. c. 121, for using seventy fishing putts for catching salmon, without having any licence for the same.

At the hearing of the information, it was admitted by the respondent, that he had seventy putts laid down in his fishery, with circles (1) at all times in them, to prevent salmon passing into them; and he alleged that the putts were placed there for the purpose of catching shrimps and flat fish only, and therefore it was not necessary for the respondent to take out, and he did not take out, any licence for the putts.

It was contended by the appellant, that the putts were fixed engines for catching salmon, and were so declared under the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109, s. 4), and that it was not necessary to prove the purpose for which they were put down.

The justices were of opinion that it was necessary for the appel-

(1) For an explanation of what these circles were, see statement of counsel at pp. 157, 158.

lant to prove that the putts were laid down for the purpose of taking salmon, and that it was not sufficient in order to bring the respondent within the penal clause, s. 36, to prove only the naked fact that the putts were there; and they declined to convict on the ground that there was no evidence that the putts were there for the purpose of taking salmon, or that salmon had been caught in them.

The question for the Court was, whether the mere fact of the putts being placed in the fishery, was sufficient on which to convict the respondent of using them for catching salmon without a proper licence.

In the second case the information was under the same section as in the first case, and was dismissed by the justices on the same ground, the only difference in the facts being that the respondent had laid down the putts without circles in them or stop-nets over them.

Manisty, Q.C., for the appellant. By s. 4 of 24 & 25 Vict. c. 109, "fixed engine" is to include putts, and putts therefore are well known as instruments whereby salmon are caught. By s. 33 of 28 & 29 Vict. c. 121, "In any fishery district subject to the control of a board of conservators, licences shall be granted at fixed prices to all persons using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill-dams, putts, putchers, nets, or other instruments, or devices, except rods and lines, whereby salmon are caught, and the produce of such licences shall be applied in defraying the expenses of carrying into effect the Salmon Fishery Acts, 1861 & 1865;" s. 36 imposes a penalty on "any person using any fishing weir, fishing mill-dams, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon, without having a proper licence for the same." If these two sections are read together, the meaning is clear, that a penalty is imposed on persons who use putts or instruments whereby salmon may be caught without a licence. In the first case, it is found that the respondent had inserted a "circle" in the putts; a circle is a circular grating of wire or basket-work, which is placed at the mouth of the putt, to which a string is

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attached, and it may be removed at any moment by merely pulling the string; so that the respondent at a convenient moment can remove the circle and catch salmon. [He was then stopped.]

The respondent did not appear in either case.

BLACKBURN, J. We think that the justices were wrong in both cases. The object of the legislature in requiring licences to be granted, was to collect a sum of money to defray the expenses of carrying into effect the Salmon Fishery Acts, 1861 and 1865; and it is only fair that those who benefit by the protection to the salmon fisheries should bear the expense of it. When we look at s. 33 we find a provision that licences shall be granted to all persons using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill-dams, putts, putchers, nets, or other instruments or devices, except rod and lines, whereby salmon are caught." I think the meaning of that is, that a licence shall be granted to a man who uses one of those devices by which salmon may be caught, not who uses a device for the purpose of catching salmon, or who tries to catch salmon, as that might be difficult to prove. A man who uses a putt or a putcher, which is an instrument or device by which salmon are caught, is a person who benefits by the salmon fishery protection, and he is therefore to pay for a licence to use it. By s. 36 the penalty is imposed on persons using any fishing weir, fishing mill-dam, putt, putcher, net, or other instrument or device, not being a rod and line, for catching salmon, without having a proper licence. In the second case, the respondent put down a putt in such a state that salmon could be caught in it, and the justices thought it was necessary for the appellant to shew that the respondent meant to catch salmon with it; but that is a mistake on their part; the penalty is imposed irrespective of intention. If people use an instrument whereby salmon may be caught, they must pay for a licence. In the other case there is this small difference, —the justices found that in the putt there was a circle, and from the explanation we have had of it, we find that the circle is a wire grating which is put into the putt, and as long as that remains fixed salmon cannot get in; but that from its nature can be, at a minute's notice, pulled out, and then the putt would be a device or instrument for catching salmon. I do not think that the fact of

having a circle in it would prevent the putt from being a device or instrument for catching salmon. There might be a possible case where a fishing weir was so staked up that it ceased to be a fishing weir, and so in the same way what was once a putt might be closed up in such a manner that it ceased for the time to be a putt; but it cannot be said to cease to be a putt when there is only that which causes a temporary interruption to its use, which interruption may at any moment be removed. We think that the justices were wrong in both cases, and they must be sent back to them.

MELLOR, J. I am of the same opinion. It is impossible not to see that any other decision would produce serious mischief. By fixing something in a putt which can be removed at a moment's notice, salmon are prevented from going into it; but still the putt does not cease to be an instrument by which salmon are caught, for the circle may be at any moment pulled out. I agree with the rest of the Court in thinking that in both cases the justices were wrong.

LUSH, J. I also think that the justices have put a wrong construction on s. 36. If that section had stood alone, it might perhaps be taken to mean any person using an instrument for the purpose of catching salmon; but reading that section with s. 33, the words that are used clearly apply to using instruments adapted for catching salmon, whether they are really used for that purpose or not.

Cases remitted accordingly.

Attorneys for appellant: *Thomas White & Sons, for Llewellin, Newport.*

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Jan. 31.

KIMBRAY *v.* DRAPER.

County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 10—*Giving Security for Costs in an action of Tort—Retrospective Enactment.*

5 Ch 476
Ch D 49

By 30 & 31 Vict. c. 142, s. 10, it shall be lawful for any person against whom an action of tort may be brought in a superior court, to make affidavit that the plaintiff has no visible means of paying costs, and thereupon a judge of the court shall have power to make an order that, unless the plaintiff within a time named give security for costs to the satisfaction of a master, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed, or the cause be remitted for trial before a county court to be named:—

Held, on the authority of *Wright* v. *Hale* (6 H. & N. 227; 30 L. J. (Ex.) 40), that the section was to be construed as retrospective, and applied to an action commenced before the passing of the statute.

THIS was an action against the defendant for alleged negligence as an attorney, and was commenced before August, 1867.

Section 10 of the County Courts Act, 1867, 30 & 31 Vict. c. 142 (which was passed on the 20th of August, 1867, and which, by s. 36, came into operation on the 1st of January following), enacts: "It shall be lawful for any person, against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort may be brought in a superior court, to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff, and thereupon a judge of the court in which the action is brought shall have power to make an order that unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a county court to be therein named; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of such county court, who shall appoint a day for the hearing of the cause, notice whereof shall be sent, by

(2) W Jur NS 1212

post or otherwise, by the registrar to both parties or their attorneys; and the county court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said county court should have power to try the said action, and the same had been commenced by plaint in the said county court; and the costs of the parties in respect of the proceedings subsequent to the order of the judge of the superior court shall be allowed according to the scale of costs in use in the county courts, and the costs of the proceedings in the superior court shall be allowed according to the scale in use in such latter court."

An application having been made by the defendant to Lush, J., at chambers, for an order on the plaintiff under the above section, it was contended on behalf of the plaintiff that the section was not retrospective, and the learned judge referred the matter to the Court.

Atkins moved accordingly, for a rule calling on the plaintiff to shew cause why she should not give security for costs, &c., in the terms of the section. The only question is whether the section is retrospective or not, so as to apply to the present action.

[BLACKBURN, J. The rule of interpretation in such cases is, that when the enactment changes or takes away rights, it is not to be construed as retrospective unless there are express words to that effect, but when it only changes mode of procedure it is to be applied to all actions.]

The present enactment only applies to matter of procedure.

McIntyre shewed cause in the first instance. The above rule of interpretation is only applicable in cases where the wording of the enactment is doubtful or admits of being interpreted as retrospective: *Moon* v. *Durden*. (1) In the present case the words are "any person against whom an action may be brought," which clearly, grammatically, can only apply to future and not to existing actions. But, moreover, this is not an enactment as to procedure; it deprives a plaintiff of the right of proceeding in the action if he cannot give security for costs.

[BLACKBURN, J. It gives him the alternative of proceeding, if he pleases, in the county court. When the legislature intends the

(1) 2 Ex. 22.

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enactment to be confined to actions commenced after the passing of the act it says so, as in s. 5.]

The language used in almost all the sections is different, as in ss. 3, 8.

[LUSH, J. The 3 & 4 Wm. 4, c. 42, s. 31, which enacts that "in every action brought" by an executor, the plaintiff shall be liable to costs, was decided in two cases to be retrospective. (1)]

Wright v. *Hale* (2), is one of the latest cases on this subject, and will be relied on by the other side; but that was simply a case of costs; and this is something more.

Atkins, in support of the rule. *Wright* v. *Hale* (3) is a very strong authority for the defendant. The Court there decided that the 23 & 24 Vict. c. 126, s. 34, which enables a judge to deprive a plaintiff of costs "in any action for alleged wrong," applied to matter of procedure only, and was therefore retrospective; and the principle of the judgments of all the Court, particularly that of Wilde, B., applies à fortiori to the present case. The learned judge says:—"I am prepared to decide this case upon principle. The rule applicable to cases of this sort is, that when a new enactment deals with rights of action, unless it is so expressed in the act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the act." That is conclusive of the present case.

COCKBURN, C.J. I own that but for the case of *Wright* v. *Hale* (2), I should have had great doubts in the present case, as I also should have had in that case, as to holding the statute to be retrospective. The principle of the decision in that case, however, is clearly applicable to the present; the enactment here is a very salutary one, and therefore I do not see why we should hesitate to adopt the decision in *Wright* v. *Hale*. (2)

BLACKBURN, J. The canon of decision in *Wright* v. *Hale* (2) is,

(1) *Freeman* v. *Moyes*, 1 A. & E. 338; *Grant* v. *Kemp*, 2 C. & M. 636.

(2) 6 H. & N. 227; 30 L. J. (Ex.) 40.

(3) 6 H. & N. 227, 232; 30 L. J. (Ex.) 40, 43.

that when the effect of an enactment is to take away a right, primâ facie it does not apply to existing rights; but where it deals with procedure only, primâ facie it applies to all actions pending as well as future. Whether the Court of Exchequer applied that test properly, in holding it was matter of procedure where a statute enabled a judge to deprive a plaintiff of costs in a case where but for the statute he would have been absolutely entitled to them, may be questionable; but for the decision in that case I certainly should have been inclined to think this was taking away a right. The present case, however, is far more clearly matter of procedure, as the statute only imposes on the plaintiff the alternative of giving security for costs or proceeding in the county court. That is certainly much more matter of mere procedure than was the case in *Wright* v. *Hale* (1), and we are bound by the principle of that case, and the rule must therefore be absolute.

MELLOR, J. I have very much doubted in the course of the argument; but I think, when we look at the whole scheme of the act, and when we see that there are clauses which, though differently worded, are clearly retrospective, that, finding no negative words in the 10th section, we may apply the principle of the case of *Wright* v. *Hale* (1), and hold that this section is also retrospective.

LUSH, J. I had very considerable doubts upon the point at chambers. Having now considered s. 10 in connection with the other clauses, and, applying the principle of analogous cases, I think we are justified in saying that the section applies to actions pending when the statute came into operation.

Rule absolute.

Attorney for plaintiff: *G. C. Rice.*
Defendant in person.

(1) 6 H. & N. 227; 30 L. J. (EX.) 40.

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Jan. 20.

IN THE MATTER OF H. S. SHERRY.

Attorney and Solicitor—Articled Clerk—Service for Ten Years as Clerk—Sufficiency of Answers as to nature of Service—23 & 24 Vict. c. 127, *s.* 4.

In March, 1855, S., then in his fifteenth year, entered the service of W., an attorney and solicitor, as a salaried clerk, and had since been continuously employed as a general clerk in attorney's and solicitor's business transacted by W. under his superintendence, and had latterly been managing clerk. On the 22nd of March, 1864, having then served for nine years, S. entered into articles of clerkship with W. for five years, being unaware of the provisions of 23 & 24 Vict. c. 127, s. 4, which enable a person to be admitted an attorney, &c., who shall for the term of ten years have been a bonâ fide clerk to an attorney, &c., and during that term shall have been bonâ fide engaged in the transaction and performance, under the direction and superintendence of the attorney, &c., of such matters of business as are usually transacted and performed by attorneys, &c., and who, after the expiration of the said term of ten years, has been bound by, and has duly served under, articles of clerkship to a practising attorney, &c., for the term of three years. In Hilary Term, 1868, S. applied to the Court, under 23 & 24 Vict. c. 127, s. 12, to be at liberty to pass his examination, in order to be admitted an attorney at the termination of the fourth year of his service under the articles in the ensuing March, on the ground that he was entitled to the benefit of s. 4.

The Court granted the application: holding that the applicant was within the meaning of s. 4, though his articles had been executed before the expiration of the ten years service; and that the requirements as to the ten years service were satisfied by his having been employed *as a clerk* from the commencement of the service in the transaction of the business of the attorney's office.

THIS was an application under 23 & 24 Vict. c. 127, s. 12 (1), by H. S. Sherry, an articled clerk, that he might be at liberty to pass his final examination during this term, in order that he might be admitted an attorney on the termination of his fourth year's service under his articles in March next.

The application was supported by an affidavit disclosing the following facts:—In March, 1855, Sherry, being then in his fifteenth year, entered the service of Mr. J. Wickens, an attorney, as a salaried clerk, and from thence up to the present time had been

(1) 23 & 24 Vict. c. 127, s. 12:—"Whenever any of the periods of three years, four years, and five years mentioned in this act, or in the 6 & 7 Vict. c. 73 (whether the same period shall have commenced before or after the passing of this act), shall expire in any vacation, then in such case any person whose period of clerkship shall so expire shall be at liberty to pass his examination in the term immediately preceding the said vacation," &c.

continuously employed in the transaction and performance of various matters of business transacted and performed by Mr. Wickens, whose business was very extensive, consisting chiefly of conveyancing, chancery, and common law practice, in all of which Sherry had been during the above period actively engaged; having at the present time the management of the business under the superintendence of Mr. Wickens.

On the 22nd of March, 1864, Sherry entered into articles of clerkship with Mr. Wickens for five years, not being then aware of the provisions of 23 & 24 Vict. c. 127, s. 4 (1), which enable a person having been bonâ fide clerk to an attorney for ten years to be admitted an attorney after three years service under articles. Mr. Wickens had consented to cancel and determine the articles on the 22nd of March next.

On Mr. Sherry's application to the examiners to be examined during this term, stating the above facts, the usual questions under 23 & 24 Vict. c. 127, s. 4, were put to Mr. Sherry and Mr. Wickens. The following were the material questions and answers by Mr. Sherry:—

1. How many years, before the execution of your articles of clerkship, were you a bonâ fide clerk to any and what attorney or solicitor?—A. Nine years to Mr. James Wickens.

2. State the nature of the business in which you were bonâ fide engaged during that period, and whether under the direction and superintendence of such attorney and solicitor.—A. The usual business transacted in a solicitor's office, under the direction and superintendence of Mr. Wickens.

(1) 23 & 24 Vict. c. 127, s. 4:—"Any person who, either before or after the passing of this act, shall for the term of ten years have been a bonâ fide clerk to an attorney, solicitor, or proctor, or attorneys, solicitors, or proctors, and during that term shall have been bonâ fide engaged in the transaction and performance, under the direction and superintendence of such attorney, solicitor, or proctor, or attorneys, solicitors, or proctors, of such matters of business as are usually transacted and performed by attorneys, solicitors, or proctors, and who shall produce to the examiners satisfactory evidence that he has faithfully, honestly, and diligently served as such clerk, and who, *after the expiration of the said term of ten years, has been bound* by and has duly served under articles of clerkship to a practising attorney, solicitor, or proctor for the term of three years," and has been duly examined and sworn in, may be admitted and enrolled as an attorney and solicitor, or proctor.

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4. What was your age at the commencement of the ten years service prior to your articles?—A. I was in my fifteenth year.

Mr. Wickens answered the first three questions as follows:—

1. How many years, before the execution of the articles of clerkship of H. S. Sherry, was he a bonâ fide clerk to you?—A. Nine years.

2. During that period what was the position he occupied in your office, and what was the nature of the business transacted and performed by him under your direction and superintendence, or of your partner?—A. The position of general clerk, and subsequently he managed the chancery and conveyancing business.

3. Was he bonâ fide engaged in the transaction and performance of such matters of business as are usually transacted and performed by you as an attorney or solicitor?—A. Yes.

The examiners having received the answers, caused Mr. Sherry to be informed that they considered that he was not entitled to be examined, as he could not, on account of his age at the commencement of the period of clerkship in March, 1865, have been engaged in the transaction and performance of such matters of business as are usually transacted by attorneys and solicitors, and that the evidence as to employment was vague and not satisfactory, and conveyed no information of the kind of work done. The examiners had also great doubts as to whether the applicant was within s. 4, having only served nine years before he entered into the articles.

Anderson, in support of the application. The examiners took two objections. First, that the employment as clerk when the applicant was only in his fifteenth year was not such a service as was within s. 4. It is clear on the answers and the affidavit that he was employed in the general business of the attorney's office, and that is sufficient; he must have been well employed and learnt a great deal, or he would not have been in the position of managing clerk, as he was latterly. The examiners seem to have supposed that the section required the clerk to have been in the position of managing clerk the whole ten years; but that is clearly not so; all the section says is, engaged in the transaction, under the superintendence of the principal, of the business usually

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transacted in an attorney's or solicitor's office, and this has been done in the present case.

[BLACKBURN, J. The person need not have been managing clerk, but he must have been engaged in legal business, not as a mere messenger.]

It is stated that he was so employed. The examiners, however, say that on account of his youth he could not have been so employed; but a youth of above fourteen would very soon acquire sufficient knowledge to be employed in legal business.

[MELLOR, J. Every person going into an attorney's office for the first time must have a beginning; and the question is whether the present applicant was employed in the same way as an ordinary clerk or rather as an articled clerk would be at first.

COCKBURN, C.J. If he was a mere errand boy, that would not do; but if he was from the first doing the same description of work as he would have done had he commenced as an articled clerk, surely that is what the legislature intended.]

The other objection is that the articles were executed before the ten years service had elapsed, instead of after the expiration: but the spirit, if not the very words, of the section, has been complied with; although he was bound before the expiration, he continued bound, and therefore was bound after the expiration, and he will have served three years since under articles.

Murray, contrà. (1) There are two questions on which the examiners wish for the opinion of the Court. First, whether the ten years service must not be completed before the clerk is bound by articles; the section says, who shall have been bonâ fide engaged for ten years as a clerk, "and after the expiration of the said term of ten years has been bound by and duly served under articles for three years." The question is important, as the same form of words is used in s. 2, by which a person may be admitted, who has taken a degree at any of the universities, and at any time after having taken such degree has been bound by and duly served under articles for three years. It was surely intended in either case that the clerk should not be bound until after he had completed his service or taken the degree.

(1) Notice of the intended application had been given to the Incorporated Law Society.

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[LUSH, J. The clerk was bound after the expiration of the ten years, although bound before also, and he will have served three years under the articles after expiration of the ten years.

BLACKBURN, J. The words are capable of either meaning. What object could the legislature have had in view, in saying that in such a case as this the execution of the articles must be after the ten years? The only difference here is, that the last year of the ten he was also bound under the articles.]

Possibly there is no difference on the merits. But under the similar wording of s. 7 of 6 & 7 Vict. c. 73, this Court held that the section could have but one construction, and that the act of binding must be after the degree had been taken. (1)

[BLACKBURN, J. The wording of the two sections is by no means precisely similar.

COCKBURN, C.J. I cannot see what possible difference it can make in the clerk's experience and acquired knowledge whether he served ten years without articles and then three under articles, or nine years without and four under articles.]

No doubt the spirit of the act, as far as this objection goes, has been complied with, if the Court think the words will admit of the construction contended for by the applicant. The other objection goes to the merits; it is as to the nature of the business transacted at the commencement of the service. The examiners thought the answers as to the nature of the service, particularly those by the master, were vague and unsatisfactory in simply saying he was employed as general clerk. À priori a boy of fourteen years old would only be employed to take messages and papers; and it is material to know what he did for the first year or two.

[COCKBURN, C.J. Supposing he was in the office *as a clerk*, doing such work as his ability enabled him to do,—and I see nothing in the answers to lead me to doubt this,—he was in the office as clerk nine years, and has since been at work four years under articles. Why should he be in a worse position than if he had been only for five years an articled clerk?

BLACKBURN, J. The examiners seem to have thought that a youth of fourteen or fifteen could not be engaged in the transaction of attorney's business within the meaning of the section.

(1) In *Ex parte Bradford*, 1 E & E. 417; 28 L. J. (Q.B.) 138.

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COCKBURN, C.J. They seem to have thought that the ten years could not begin to count during the time the clerk was too young to be actually conducting the business of the attorney; but the question is whether the legislature, in using the words "engaged for ten years in the transaction and performance of the business usually transacted and performed by an attorney and solicitor," meant to include in the ten years the period from which the education of the clerk begins in the office of the master; and if we see the effect of the present state of the law is to include that period in the five years of a clerkship under articles, I am at a loss to see why it should not be included in the ten years.]

An articled clerk is taught; moreover, he is older when he begins.

[COCKBURN, C.J. He is taught by the practice of the office. If a lad begins at fourteen or fifteen, and goes on for ten years till he is twenty-four or twenty-five years old doing the practical work of the office, surely that experience is as good as the first two years of the service under articles.]

The examiners only desire the opinion of the Court. They thought the master ought to be more explicit, in order to enable them to exercise their discretion, the section requiring the clerk to produce to them "satisfactory evidence" of his service; and they thought the answer to the usual question that "his position was of general clerk," omitting to specify the nature of the work done at the time, was insufficient, and that they might reasonably be dissatisfied with it. The clerk has been told this; and further answer might even now be given.

Anderson, contrà, intimated that both clerk and master were ready to make further answer.

Per curiam (COCKBURN, C.J., BLACKBURN, MELLOR, and LUSH, JJ.), the present answers are sufficient; and the application may be granted.

Rule absolute accordingly.

Attorney for applicant: *J. Wickens.*

Attorney for Incorporated Law Society: *E. W. Williamson.*

1868
Jan. 31.

THE QUEEN ON THE PROSECUTION OF THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY, *v.* THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Construction—The London, Chatham, and Dover Railway (Arrangement) Act (30 & 31 Vict. c. ccix.), s. 4—"Proceedings"—Practice.

Section 4 of 30 & 31 Vict. c. ccix. enacts, that "from and after the passing of this act, no actions, suits, executions, attachments, or other proceedings against the London, Chatham, and Dover Railway Company, or affecting the property thereof, except" &c., ... "shall be continued or commenced" during a certain period, unless with the leave of the court of Chancery:—

Held, that the taxation of costs in a suit for a writ of mandamus which had terminated before the passing of the act, was a "proceeding" within this section, and could not be commenced without such leave.

BEFORE the passing of the London, Chatham, &c., Railway (Arrangement) Act (30 & 31 Vict. c. ccix.), a writ of mandamus had been obtained by the prosecutors to compel the defendants to convey certain lands to the prosecutors. The matter was ultimately arranged, and on the 28th of May, 1867, a judge's order was made by consent that all further proceedings in the matter of the mandamus should be stayed, with costs, to be paid by the defendants to the prosecutors. The act passed on the 20th of August, 1867, and an appointment was afterwards made by the master of the crown office to tax the costs against the defendants under the judge's order. Subsequently a rule nisi was obtained by the defendants calling on the prosecutors to shew cause why the taxation of these costs should not be discontinued or suspended under s. 4. (1)

(1) 30 & 31 Vict. c. ccix., s. 4, enacts that, "save as is hereinafter provided from and after the passing of this act, no actions, suits, executions, attachments, or other proceedings against the company, or affecting the property thereof, except proceedings against the company as carriers of goods or passengers, or in respect of liabilities contracted after the passing of this act, shall be continued or commenced during the period hereinafter defined and referred to as 'the suspense period,' unless with the leave of the Court, and upon such terms as the Court may impose; provided that the costs of any actions, suits, executions, attachments, or other proceedings against the company, or affecting the property thereof, which shall be discontinued pursuant to this clause, shall be in the discretion of the Court, and if allowed, shall be added to the debt."

By s. 3, "the Court" shall mean the High Court of Chancery.

By s. 6, "The 'suspense period' shall be a period of ten years from the passing of this act."

Hannen shewed cause. (1) The taxation of costs is not a "proceeding" under s. 4 of 30 & 31 Vict. c. ccix. It is merely ancillary to other proceedings which have terminated, and which are therefore not within the provisions of the act. The wording of the latter part of the section shows that this is the true construction, because "costs" are there distinguished from "proceedings." No harm would be done by allowing these costs to be taxed, because payment could not be enforced without leave of the court of Chancery. If, however, the defendants are willing to pay these costs, they can do so under s. 29 (2), by giving debentures for the amount after that amount is ascertained. Unless the costs are taxed, this cannot be done.

Watkin Williams, in support of the rule. Taxation of costs is clearly a "proceeding" in the ordinary sense of the word "proceeding." The words of the section are most sweeping, and are quite large enough to include taxation of costs, and the spirit of the section is quite opposed to any such step being taken as the taxing of costs. The object of the section is clearly to prevent all kinds of litigation. A taxation of costs may be a very long and very expensive matter, and is therefore as much within the mischief against which the section was passed, as any other proceeding. If there is any special reason for taxing these costs, the prosecutors should obtain the leave of the court of Chancery. They must obtain such leave before they can derive any benefit from the taxation by enforcing payment of the costs. The taxation might, therefore, be a fruitless expense, unless the leave of the court of Chancery were first obtained.

BLACKBURN, J. I think that this rule must be made absolute. Mr. Williams has convinced me that the effect of s. 4 of 30 & 31 Vict. c. ccix. is, as he contends, to stay such a proceeding as the taxation of costs. [The learned Judge read the section.] In this

(1) In the Bail Court, before Blackburn and Shee, JJ.

(2) 30 & 31 Vict. c. ccix., s. 29, enacts that "C debenture stock shall be issued at par in exchange for equal amounts of general debts to any general creditor who shall demand the same, provided that it shall be lawful for the board to state accounts, compromise and ascertain general debts by arbitration, or otherwise, with general creditors, and to issue C debenture stock for the amount so stated, compromised, or ascertained."

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case the suit was commenced and had terminated before the passing of the act. All that remains to be done is to tax the costs, in order to ascertain their amount. This may be an expensive matter, and is, I think, a further step in the proceedings, and as such comes within the section. The intention of the legislature was that all proceedings should be stayed, and I think that there is an analogy between the provisions of this section and those of the common order for a stay of proceedings. If this Court had made such an order, it would stay the taxation of costs until the order was discharged. We may assume that, primâ facie, the legislature meant to produce the same effect by this section as would have been produced in any particular case by a stay of proceedings. We must now look at the proviso at the end of the section as to costs. [The learned Judge read the latter part of the 4th section]. Undoubtedly the section authorizes the court of Chancery to allow costs of the proceedings, and in order to ascertain the amount of such costs they must be taxed. In a case like the present, where the whole suit is ended except only the taxation of costs, the court of Chancery might in its discretion allow the taxation to be proceeded with. The court of Chancery, however, has not yet allowed the proceedings to be continued, and I think that if the taxation were allowed to proceed, the very mischief which the act was passed to prevent would be continued. I think, therefore, that this proceeding must be stayed until leave is obtained from the court of Chancery to proceed.

SHEE, J., concurred.

Rule absolute.

Attorney for prosecutors: *G. Faithfull.*
Attorneys for defendants: *Rose, Baxter, & Norton.*

WATERTON *v.* BAKER.
FIELD, CLAIMANT.

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Jan. 16.

Practice—County Court—Notice of Appeal—Security for Costs—13 & 14 *Vict.* c. 61, *s.* 14—*County Court Rules of* 1857, *r.* 134.

By 13 & 14 Vict. c. 61, s. 14, on appeal from the county court, the party appealing shall, within ten days after the determination appealed against, give notice of appeal to the other party, and also give security to be approved by the registrar for the costs of the appeal. By County Court Rule 134, where a party proposes to give a bond by way of security, he shall give to the opposite party and the registrar notice of the proposed sureties, and the registrar shall fix a day for the bond to be executed, and for the other party to make any objection he may have to the sureties.

An interpleader summons in a county court having been determined against the claimant on the 16th of November, he, on the same day, gave notice of appeal, and tendered a bond with sureties to the registrar; on the 19th of November he gave notice of the proposed sureties to the plaintiff. The plaintiff requiring further information as to the sufficiency of the sureties, and the claimant having been unable to obtain a definite answer from the plaintiff as to whether or no he objected to the sureties, the registrar, on the 17th of January, fixed the 21st of January for the execution of the bond, and gave notice to the plaintiff to make his objection, if any, on that day. The plaintiff did not appear, and the bond was then executed with the original sureties:—

Held, that although the security had not been completed until after the ten days, yet as the appellant had done all he could to perfect it within that time, and the delay was caused by the plaintiff, the appellant had complied with the requirements of s. 14 and rule 134, and was entitled to have his appeal heard.

THIS was an appeal from a County Court.

Codd moved for a rule to strike the appeal out of the paper, on the ground that the appellant had not complied with the requirements of s. 14 of 13 & 14 Vict. c. 61, and rule 134 of the County Court Rules of 1857. (1)

(1) By s. 14 of 13 & 14 Vict. c. 61, an appeal to a superior court, in certain cases, is given to a party dissatisfied with the determination of the county court, "provided that such party shall, within ten days after such determination, give notice of such appeal to the other party or his attorney, and also give security, to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant and the appeal be dismissed."

By rule 134 of the County Court Rules, made in 1857, in pursuance of s. 32 of 19 & 20 Vict. c. 108, it is provided: "In all cases where a party proposes to give a bond by way of security, he shall serve, by post or otherwise, on the opposite party and the registrar at his office, notice of the proposed sureties

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He cited *Stone* v. *Dean* (1); *Norris* v. *Carrington*. (2)

The facts disclosed in the affidavits were as follows:—

Field having claimed goods taken in execution on a judgment obtained by the plaintiff in a plaint of *Waterton* v. *Baker*, in the County Court of Hertfordshire, holden at Watford, an interpleader summons was granted, and tried on the 22nd of October, 1866; the judge took time to consider, and adjourned the summons to the 16th of November, the next court day. On the 3rd of November the claimant received a notice from the registrar that the judge had decided the case in favour of the plaintiff, and had ordered the judgment to be entered up as of the 22nd of October. On the 6th of November the claimant received a copy of the judgment, and on the 12th, he sent by post to the registrar and to the plaintiff's attorney, a notice of his intention to appeal. On the 16th, the claimant attended at the county court, and stated to the registrar his intention to appeal, and handed to him a draft bond, with the names of the proposed sureties, for his approval. The draft bond was returned by the registrar as approved of by him on the 18th of November. On the 19th of November the claimant sent by post to the plaintiff's attorney a notice, in writing, of his proposed sureties. On the 28th of November he wrote to the plaintiff's attorney, requesting that he might be informed whether the sureties were approved of, and received an answer from the attorney asking for information as to who and what the sureties were. A correspondence then ensued, in the course of which the plaintiff's attorney was repeatedly remonstrated with by the claimant for his delay, and urged to state whether he approved of the sureties.

On the 17th of January, 1867, the registrar gave notice to the claimant to attend before him on the 21st of January, to execute the bond, and gave notice to the plaintiff's attorney that, if the

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in the form set forth in the schedule, and the registrar shall forthwith give notice to both parties of the day and hour on which he purposes that the bond shall be executed, and shall state in the notice to the obligee that, should he have any valid objection to make to the sureties, or either of them, it must then be made." The corresponding rule in operation since January, 1868, is rule 181.

(1) E. B. & E. 504; 27 L. J. (Q.B.) 319. 4 Jur. N.S. 534

(2) 16 C. B. (N. S.) 10.

plaintiff had any valid objection to make to the sureties proposed by the claimant, it was then to be made.

The claimant attended on the 21st of January, the plaintiff did not appear, and the bond was executed with the original sureties.

Keane, Q.C., and *Joyce*, shewed cause in the first instance. The cases cited do not govern the present case. In neither case had the appellant taken any step to comply with the statute; here, he has done all in his power: it is the plaintiff who is in fault, and has caused the delay in the execution of the bond. By his conduct he has consented to the course which has been taken, and he cannot now raise any objection: *Andrews* v. *Elliott*. (1) In *Mayer* v. *Harding* (2), a decision on s. 2, of 20 & 21 Vict. c. 43, which requires a case stated by justices to be lodged by the appellant within three days of receiving the same, it was held that the words of that statute were directory only, and, if it were impossible to lodge the appeal within the prescribed time, it was a sufficient compliance with the statute if it were done as soon as it was possible.

Codd, in support of the rule. In *Mayer* v. *Harding* (2), the case stated by the justices was received by the appellant on Good Friday, and the office of the court being closed he could not lodge the case until the following Wednesday. Here there was ample time for the claimant to have perfected the bond. The entering into the bond and giving notice of appeal are conditions precedent, which cannot be waived; they must be strictly complied with, otherwise the Court has no jurisdiction to hear the appeal. *Morgan* v. *Edwards* (3) decides that transmitting a case to the court and giving notice with a copy of the case, to the respondent, within three days, under s. 2 of the 20 & 21 Vict. c. 43, are conditions precedent which cannot be waived.

COCKBURN, C.J. I think that the rule must be discharged. It is provided by s. 14 of 13 & 14 Vict. c. 61, that where a party intends to appeal he shall, within ten days after the determination of the court, give notice of appeal to the other party or his attorney, and also give security to be approved of by the registrar

(1) 5 E. & B. 502; 25 L. J. (Q.B.) 336. 1 Jur. N.S. 1046

(2) Law Rep. 2 Q. B. 410.

(3) 5 H. & N. 415; 29 L.J. (M.C.) 108. 6 Jur. N.S. 379.

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of the court for the costs of the appeal. I think, looking at the rule of practice made under the subsequent act, that we may read the words "give security" as meaning offering security which is afterwards accepted as good and sufficient. In the cases to which our attention has been called, it appeared that the appellants had taken no steps towards complying with the statute until after the ten days had elapsed. Here, although the judgment of the county court has been entered as of the 22nd of October, it cannot be deemed to have been pronounced so as to be the subject of appeal until the 16th of November; and on that day the claimant tendered to the registrar a bond with the names of the sureties: that is, I think, a sufficient compliance with the requirements of the statute so far as giving notice to the registrar is concerned. Then, in compliance with rule 134, the appellant not only gave notice to the attorney for the plaintiff of his intention to appeal and give security, but he also gave the names of his sureties, and the attorney—as he was perfectly justified in doing—required further information as to who the sureties were, and took time to make inquiries. The delay which has occurred is not the act of the claimant, who has given, within the prescribed time, notice of his intention to appeal, and has also given in the names of good and sufficient sureties. I say good and sufficient, because it appears that they were afterwards accepted by the registrar as satisfactory. It would be exceedingly hard and unjust upon a party that he should be debarred from appealing, because the registrar, from some cause or other, such as sickness, or requiring further information, is unable to complete the matter in due time, and à fortiori if the delay occurs because the other party wants time to make further inquiries; I think it would be monstrous to say in such a case that a man is to be ousted of his right to appeal which the legislature intended him to have. I think the fair construction of the statute is that a party, so far as in him lies, must within the prescribed time offer the security, and be ready to make it effectual. If he does that, and afterwards completes the security, he has done all that he is bound to do, and is entitled to his appeal. This decision in no way conflicts with the two cases which have been cited.

MELLOR, J. I am of the same opinion. No doubt the enactment that security must be given within ten days is a condition precedent to the right to appeal, but it is only necessary to comply with it in a reasonable manner. Here everything has been done that could be done by the claimant to entitle him to have the appeal heard, and I do not think our decision conflicts with the cases cited.

SHEE, J. I am also of the same opinion. The object of the enactment is to secure to the unsuccessful suitor an appeal; but an appeal is to be allowed only on his giving security to the successful party for the costs of the appeal. In order that the proceedings may not be unduly delayed, he is bound to give notice of appeal within ten days, and rule 134 provides that notice of the sureties is to be given to the successful party and to the registrar of the court. This is all that the appellant ought to do. If he gives notice of appeal within ten days, and gives notice to the successful party and to the registrar who his sureties are, and if the registrar approves of them, and they ultimately execute the bond, then he does all that he is called upon by s. 14 and the rule to do: the words "to be approved of," seem to imply that the registrar who is to approve shall have some reasonable time in which he is to ascertain whether the sureties proposed are sufficient. The successful party also ought to have some time to inquire into the sufficiency of the sureties offered; therefore, if the unsuccessful party has offered to do within the ten days all that he is bound to do, the mere fact of the sureties not being approved of within that time ought not to deprive him of his appeal.

LUSH, J. The cases cited only shew that notice of appeal must be given within ten days, and do not guide us in determining the present case: because in neither of them did the party proposing to appeal take any steps towards giving any security until after the ten days had elapsed. In the present case the claimant gave notice of appeal in time; he also, within the prescribed time, gave to the other side the names of the sureties, and might have perfected the security but for the delay sought by the successful party in order to inquire into the sufficiency of the sureties; these sureties were afterwards accepted, and therefore the claimant was ready

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within ten days to comply with the statute and the rule. I think that this case comes within the meaning of the section; if a contrary construction were adopted, it would always be within the power of the successful party to defeat the appeal.

Rule discharged.

Attorneys for plaintiff: *Crosley & Burn, for Simpson, St. Albans.*
Claimant in person.

Jan. 17.

DIGNAM *v* BAILY.

Debtor and Creditor—Sheriff—Escape—Certificate of Registration of Composition Deed—Extent of operation of s. 198 *of Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134).

A debtor executed and registered a deed under s. 192 of the Bankruptcy Act, 1861, and was subsequently arrested upon a ca. sa. on a judgment recovered in respect of a cause of action which first accrued after the execution and registration of the deed. The debtor produced to the officer who arrested him the certificate of the registration of the deed, and was thereupon discharged from custody. In an action by the creditor against the sheriff for an escape:—

Held, on demurrer, that the production of the certificate did not justify the sheriff under s. 198 in releasing the debtor.

DECLARATION that the plaintiff on the 11th of December, 1866, obtained judgment against one Thomas Brassington, that a ca. sa. was sued out and delivered to the defendant, as sheriff of Kent, commanding him to arrest Brassington, to satisfy the plaintiff's debt and interest from the 11th of January, 1866, on which day the judgment was entered up; that the defendant arrested Brassington, and afterwards allowed him to escape.

Plea, that after the defendant's officer had taken Brassington in execution, Brassington produced to the officer, and gave him a copy of, the certificate from the Court of Bankruptcy of the due registration of a deed made and executed between Brassington and his creditors, within the true intent and meaning of s. 198 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), whereupon the defendant's officer released Brassington from custody. (1)

(1) 24 & 25 Vict. c. 134, s. 198, enacts that, "a certificate of the filing and the registration of such deed . . . shall be available to the debtor for all purposes as a protection in bankruptcy."

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Replication, that the plaintiff's cause of action against Brassington, in respect of which the judgment was recovered, first accrued after the making and after the registration of the deed, and the plaintiff was not a creditor of Brassington in respect of the said cause of action when the deed was made, nor when the same was produced and left for registration, nor until after the certificate was granted; and the defendant was not one of the creditors referred to or intended to be bound by the deed.

The plaintiff also demurred to the plea.

The defendant demurred to the replication.

November 27, 1867. *J. O. Griffits*, for the plaintiff. The deed had no operation against the plaintiff's debt, and the certificate is only available to the same extent as a protection in bankruptcy; consequently it was not available in the present case, and the defendant is liable for an escape. It may be hard upon the sheriff but there was the very same hardship in cases where a certificate in bankruptcy turned out inoperative. Precisely the same point has been lately decided against the sheriff by the Court of Exchequer in *Williams* v. *Rose* (1), not yet reported.

Raymond, for the defendant. To hold the defendant liable, would be to put the very hardship on the sheriff which the Court of Exchequer Chamber in *Lloyd* v. *Harrison* (2) said ought not to be thrown upon him. And if the certificate of a deed altogether invalid is yet a justification to the sheriff, à fortiori the certificate of a valid deed, though quà the particular creditor it may be inoperative. In *Williams* v. *Rose* (1), there was an allegation that the sheriff had knowledge that the plaintiff's debt was subsequent to the deed.

[LUSH, J. The ca. sa. would give the date of the judgment though not of the debt, and the certificate the date of the deed and of its registration; so that the sheriff would at any rate know that the judgment was subsequent to the deed.]

Griffits, in reply.

[THE COURT intimated that they would defer giving judgment until they had had an opportunity of seeing a report of *Williams* v. *Rose* (1)].

Cur. adv. vult.

(1) Law Rep. 3 Ex. 5. (2) Law Rep. 1 Q. B. 502.

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January 17. The judgment of the Court (Mellor and Lush, JJ.), was delivered by

LUSH, J. We deferred our judgment on this demurrer, in order to consult a case involving the same question, which we were told had been decided by the Court of Exchequer, and which had not at the time of the argument been reported. The case is *Williams* v. *Rose* (1), now reported in the Law Reports, and the judgment is expressly in point for the plaintiff. The pleadings are somewhat different from those in the present case, the replication there setting out the dates of the judgment and of the deed, shewing the deed to be anterior to the judgment, and averring that these dates appeared in the ca. sa. and the certificate, and so were known to the sheriff at the time of the arrest. But these differences appear to us to be immaterial. The material allegation, common to both cases, is that the debt of the plaintiff for which the ca. sa. was issued did not accrue till after the date and registration of the deed, and that therefore the plaintiff was not one of the creditors whose claims are discharged by it, and this allegation here, as in that case, is admitted by the demurrer. It is therefore clear that the certificate did not protect the debtor from arrest for the debt in question, and it follows that the sheriff in discharging him was guilty of an escape.

Whether the sheriff had the means of knowing that the plaintiff's debt was discharged or not cannot, we think, affect the plaintiff's right; but we cannot help observing that, as a ca. sa. does contain the date of the judgment and the certificate the date of the deed, the sheriff had knowledge of all that is alleged in the replication in *Williams* v. *Rose* (1), over and above what is alleged in the replication in this case. Our judgment is, therefore, for the plaintiff.

Judgment for the plaintiff.

Attorney for plaintiff: *T. E. Harper.*
Attorneys for defendant: *Palmer, Palmer, & Bull.*

(1) Law Rep. 3 Ex. 5.

CORY AND OTHERS *v.* THE THAMES IRONWORKS AND SHIP-BUILDING COMPANY, LIMITED.

1868
Jan. 17.

Contract of Sale—Measure of Damages for non-delivery of Chattel.

Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, the buyer can recover, as damages for the non-delivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount.

The defendants agreed to sell and deliver to the plaintiffs within a certain time the hull of a floating boom derrick; but they did not deliver it till six months after the specified time. The plaintiffs, who were large coal merchants in the port of London, purchased the hull in order to place in it, as they in fact did, large hydraulic cranes and machinery for the purpose of transhipping their coals direct from colliers into barges. The hull was the first vessel of the kind ever built, and the plaintiffs' special purpose was entirely novel, and was unknown to the defendants. The defendants believed that the plaintiffs were purchasing the hull for the purpose of using her as a coal store. If the plaintiffs had been prevented using the hull for their special purpose, they would either have sold her to be used, in the hulk trade, as a coal store, or, if unable to do so, would have used her themselves as a store, and this was the most obvious use to which such a vessel was capable of being applied by persons in the coal trade: but the hulk trade is a distinct branch of the coal trade, and was no part of the plaintiffs' business. Had the hull been purchased for this purpose, the delay in the delivery would have occasioned loss to the amount of 420*l.* The plaintiffs actually suffered damage to a much larger amount from not having the hull ready for their special purpose at the time fixed for the delivery:—

Held, that the plaintiffs were entitled to the 420*l.* as the damages which the defendants must be taken to have contemplated would result from the non-performance of their contract.

THIS was an issue directed by the court of Chancery under 8 & 9 Vict. c. 109, to ascertain the amount of damages to which the plaintiffs were entitled, inter alia, by reason of the delay by the defendants in the delivery of the hull of a floating boom derrick, under a contract of sale.

At the trial before Shee, J., at the sittings in London, after Hilary Term, 1864, a verdict was taken for the plaintiffs, subject to a case to be stated by an arbitrator.

1. The plaintiffs are coal merchants and ship owners, having a very large import trade in coal from Newcastle and other places into the port of London. The defendants are iron manufacturers and ship builders in London.

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2. The plaintiffs had introduced, at the docks where they discharged the cargoes of coal from their ships, a new and expeditious mode of unloading the coals by means of iron buckets, which were worked by hydraulic pressure over powerful cranes, and the plaintiffs' trade having considerably increased they were desirous of improving the accommodation offered in the discharge of their vessels by the above mode; this the defendants were not aware of.

3. The defendants had been building for the Patent Derrick Company the hull of a large vessel called a patent boom derrick, which was constructed and fitted with heavy and powerful machinery for raising sunken vessels or other similar purposes requiring great power. The derrick was a large flat-bottomed iron vessel or float, 250 feet long by 90 feet wide and 14 feet deep, divided by iron bulk heads of great strength into more than eighty compartments, measuring generally 15 feet long by 13 feet wide, she was decked over all and had hatchways leading from the deck to the interior.

4. During the constructing of this vessel the Derrick Company became insolvent, and as the defendants could not obtain payment for the vessel they were obliged to take it upon their own hands and sell it for the best price they could obtain.

5. On the 1st of October, 1861, the plaintiffs entered into the following agreement with the defendants:—The defendants agree to sell and the plaintiffs agree to purchase "for the sum of 3500*l.*, the hull of the floating boom derrick now lying in Bugsby's Hole in the river Thames. It is agreed between the parties hereto that payment shall be made in the following manner, that is to say, the sum of 350*l.* at the signing of this memorandum, a further sum of 1400*l.* when possession is given, which is to be given within three months from the date hereof, and the sum of 1750*l.* by a bill of exchange to be dated on the day when possession is given, and to be drawn at six months' date" by the defendants and accepted by the plaintiffs. The defendants were to be at liberty to sell the tripod, boom, and other machinery in the hull.

6. The plaintiffs purchased the derrick for the purposes of their business, in order to erect and place in it, as they in fact did, large hydraulic cranes and machinery, such as they had previously used at the docks, and by means of these cranes to tranship their

coals from colliers into barges without the necessity for any intermediate landing, the derrick, for this purpose, being moored in the river Thames, and the plaintiffs paying the conservators of the river a large rent for allowing it to remain there.

7. The derrick was the first vessel of the kind that had ever been built in this country, and the purpose to which the plaintiffs sought to apply it was entirely novel and exceptional. No hull or other vessel had ever been fitted either by coal merchants or others in a similar way or for a similar purpose; and the defendants at the date of the agreement had notice that the plaintiffs purchased the derrick for the purpose of their business, considering that it was intended to be used as a coal store; but they had no notice or knowledge of the special object for which it was purchased and to which it was actually applied.

8. At the date of the agreement the defendants believed that the plaintiffs were purchasing the derrick for the purpose of using her in the way of their business as a coal store; but the plaintiffs had not at that time any intention of applying the derrick to any other purpose than the special purpose to which she was in fact afterwards applied.

9. If the plaintiffs had been prevented from applying the derrick to the special purpose for which she was purchased and to which she was applied, they would have endeavoured to sell her to persons in the hulk trade as a hulk for storing coals, and had they been unable to sell her, they could and would have employed her in that trade and in that way themselves; that was the most obvious use to which such a vessel was capable of being applied by persons in the plaintiffs' business, but the hulk trade is a distinct branch of the coal trade, and neither formed nor forms any part of the business carried on by the plaintiffs; and the derrick being an entirely novel and exceptional vessel and the first of the kind built, no vessel of the sort had ever been applied to such a purpose. The derrick was, however, capable of being applied to and profitably employed for that purpose, and had she been purchased for that purpose her non-delivery at the time fixed by the agreement would have occasioned loss and damage to the plaintiffs to the amount of 420*l.*

10. Great difficulty was experienced in removing the tripod and

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other things from the hull in consequence of their enormous weight and size, and the hull was not cleared until the latter end of May, 1862, when it was found that some damage had been done to the bottom and other parts of the vessel in the course of removing the machinery.

11. Upon the hull being cleared, the defendants gave notice to the plaintiffs that they were ready to deliver it to them.

12. The plaintiffs, however, refused to receive the hull until the damage had been properly repaired, and some difference arose between the respective surveyors of the plaintiffs and defendants as to the extent of the injury and the proper mode of repairing it. The plaintiffs continued to make objections to the sufficiency of the repairs until the 1st of July, 1862, when the vessel was delivered.

13. The plaintiffs, on the 1st of October, 1861, duly paid to the defendants 350*l.* in part payment of the purchase-money, and they also duly paid the remainder of the purchase-money at the time when the hull was delivered to them.

14. The three months within which, according to the terms of the agreement, the defendants were to give up to the plaintiffs possession of the hull, expired on the 1st of January, 1862, but the defendants did not deliver it to the plaintiffs until the 1st of July, 1862.

15. The injury caused to the hull in the removal of the machinery depreciated her to the amount of 50*l.*

16. The plaintiffs, in anticipation of the delivery of the hull in January, 1862, entered into a contract with Sir William Armstrong for the construction and delivery to them at a very heavy outlay of the necessary machinery for the purpose for which they purchased the hull, and in consequence of the delay in the delivery of the hull by the defendants, the plaintiffs were prevented from taking delivery of the machinery from Sir William Armstrong, and the plaintiffs, on the 25th of July, 1862, paid Sir William Armstrong 3000*l.*, the interest of which was lost to them. The plaintiffs also purchased, at a large cost, two steam tugs to be used, in conjunction with the hull, in towing the coal barges to and from the same, and which steam tugs were comparatively useless to the plaintiffs during the time in which the hull was undelivered, and the interest of the money expended on the same

was lost to the plaintiffs; but none of the circumstances were known to the defendants.

17. If the defendants had delivered the hull to the plaintiffs in proper time the plaintiffs would have realised large profits by the use of it in the aforesaid manner, and they were put to great inconvenience and sustained great loss owing to their not having possession of the hull to meet the great increase in their trade.

18. The plaintiffs also lost 8*l.* 15*s.* for interest upon the portion of the purchase-money of the hull paid by them to the defendants before delivery.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover against the defendants the whole or any, and which of the above heads of damage?

J. Brown, Q.C. (*Watkin Williams* with him), for the plaintiffs. The question is to what amount of damages the plaintiffs are entitled by reason of the delay by the defendants for six months in the delivery of the hull of the derrick. It appears from paragraphs 6—9 that the hull itself was a novelty on the Thames, and the special purpose for which the plaintiffs bought it, viz., to tranship coals, by means of hydraulic cranes, direct from the colliers to barges, was also a novelty, and unknown to the defendants; but it also appears that the defendants knew that the hull was to be used by the plaintiffs for some purpose connected with their coal trade, and the defendants supposed that it was to be used as a hulk for storing coals, which was the obvious use to which it might be applied; and if it had been put to this latter use the arbitrator finds that the delay in the delivery would have caused a loss to the plaintiffs of 420*l.* The plaintiffs sustained, in fact, a much greater loss from not having the hull ready for their special purpose (paragraphs 16, 17); but it must be admitted that the plaintiffs, according to the decision in *Hadley* v. *Baxendale* (1), are not entitled to claim this greater measure of damages, as the defendants were not aware of the special purpose for which the hull was bought. However, the plaintiffs are entitled, in conformity with the decision in that case, to the 420*l.*, as that is the amount of damages which may reasonably be considered as arising naturally

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

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from the breach of contract. The plaintiff would, at all events, clearly be entitled to the interest on their purchase-money (paragraph 18).

[BLACKBURN, J. In the alternative of their not being entitled to the 420*l.*]

Yes; and also to the 50*l.* deterioration (paragraph 15). But the main question is as to the 420*l.*, and the mere reading of statement of the arbitrator in paragraphs 6—9 shews that the plaintiffs are entitled to this.

The Court then called upon

J. D. Coleridge, Q.C. (*Garth, Q.C.*, and *Philbrick* with him), for the defendants. No doubt the plaintiffs are entitled to the interest, in the alternative, and to the 50*l.*; but they are not entitled to the 420*l.* This sum is the damages resulting from a special purpose, within the principle of *Hadley* v. *Baxendale* (1), just as much as the larger sum, which the plaintiffs admit they cannot claim. The rule laid down in *Hadley* v. *Baxendale* (1) is a substantial and not merely technical rule, viz., that you are to endeavour to ascertain the real amount of damages that the plaintiff has sustained, and if it is just and reasonable that the defendant should make good this amount, he must pay it: provided that if he had no notice of any circumstance which makes the plaintiff's loss greater than it ordinarily would be, he cannot be called upon to pay this extra damage; and the Court of Exchequer say if this limit were not put there would be no limit to what defendants in certain circumstances might be called upon to pay; and therefore, say the Court, in order to recover from the vendor the damage accruing on account of some special sub-contract or other circumstance, the vendee must affect him with notice. And the Court lay down the rule that the plaintiff can only recover such damages as are the natural result of the breach of contract in ordinary circumstances, or,—which would appear to be another mode of expressing the same thing,—what were in the contemplation of both parties at the time of the contract.

[BLACKBURN, J. The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of.]

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Accepting that as the statement of the law, what are the facts here? The subject-matter of the contract is entirely novel: and the purpose for which it was intended to be used in point of fact was entirely novel and exceptional; but any use of this hull would be novel and exceptional, so that the 450*l.* comes as much within the rule in *Hadley* v *Baxendale* (1) as the other and larger loss actually sustained.

[COCKBURN, C.J. No doubt, in order to recover damage arising from a special purpose the buyer must have communicated the special purpose to the seller; but there is one thing which must always be in the knowledge of both parties, which is, that the thing is bought for the purpose of being in some way or other profitably applied.]

No doubt; but the arbitrator has not found that. He finds the special purpose for which the hull was bought, and to which it was in fact applied, and also the amount of damage which the plaintiffs would have suffered had they applied it to another special purpose.

[BLACKBURN, J. Yes; but the arbitrator (paragraphs 8 and 9) says that was the most obvious purpose, and the one to which the defendants supposed the hull was intended to be applied.]

But it is a use totally distinct from that to which the plaintiffs applied and intended to apply it.

[COCKBURN, C.J. The two parties certainly had not in their common contemplation the application of this vessel to any one specific purpose. The plaintiffs intended to apply it in their trade, but to the special purpose of transhipping coals; the defendants believed that the plaintiffs would apply it to the purpose of their trade, but as a coal store. I cannot, however, assent to the proposition that, because the seller does not know the purpose to which the buyer intends to apply the thing bought, but believes that the buyer is going to apply it to some other and different purpose, if the buyer sustains damage from the non-delivery of the thing, he is to be shut out from recovering any damages in respect of the loss he may have sustained. I take the true proposition to be this. If the special purpose from which the larger profit may be obtained is known to the seller, he may be made responsible to

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the full extent. But if the two parties are not ad idem quoad the use to which the article is to be applied, then you can only take as the measure of damages the profit which would result from the ordinary use of the article for the purpose for which the seller supposed it was bought. And the arbitrator, as I understand it, finds that the hull was capable of being applied profitably as a coal store; if it had not been applied by the plaintiffs to their special purpose.]

But no vessel of the sort had ever been applied to such a purpose as a coal store. And this kind of damage is a damage which the plaintiffs never suffered, and which they never contemplated suffering.

[MELLOR, J. It was the most obvious purpose to which such a vessel could be applied in the plaintiffs' trade.

COCKBURN, C.J. And the purpose to which it may be fairly supposed, and as in fact the defendants did suppose, that the plaintiffs would have applied it, had they been prevented by the failure of the machinery, or any other cause, from being able to apply it to their special purpose. And so far as the defendants, the sellers, expected that the plaintiffs, the buyers, would be losers by their non-delivery of the vessel according to contract, so far it is just and right that the defendants should be responsible in damages.]

That, no doubt, would be a just rule; but it is not the rule laid down in *Hadley* v. *Baxendale*. (1)

[BLACKBURN, J. That argument seems to assume that the principle laid down in *Hadley* v. *Baxendale* (1) is that the damages can only be what both parties contemplated, at the time of making the contract, would be the consequence of the breach of it; but that is not the principle laid down in *Hadley* v. *Baxendale*. (1) The Court say: "We think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, i.e. according to the usual course of things, from such breach of contract itself," — that is one alternative, — "or such as may

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. 18 Jur 350

reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Now, in the present case the breach of contract was the non-delivery at the agreed time of a hull capable of being used as a hulk for storing coals, and the consequences that would naturally arise from such non-delivery of it would be that the purchaser would not be able to earn money by its use, and this loss of profit during the delay would be the measure of the damages caused by the non-delivery.]

But the purpose supposed by the defendants was not part of the business of the plaintiffs, the hulk trade being a distinct branch; so that it is impossible to say that the loss of profit which might have been derived from this supposed purpose could have reasonably been contemplated as the natural consequence of the defendants' breach of contract.

[MELLOR, J. That is tying down the arbitrator's finding too strictly. There must be some profitable purpose, and this was the most obvious profitable purpose. Suppose there are two equally profitable but distinct modes of using the same thing, and the buyer contemplates one use, and the seller the other, it is not because the one party contemplated one use and the other the other, that the buyer is not to get any damages at all.]

The answer is, such a case is not within the rule in *Hadley* v. *Baxendale*. (1)

COCKBURN, C.J. I think the construction which Mr. Coleridge seeks to put upon the case of *Hadley* v. *Baxendale* (1), is not the correct construction as applicable to such a case as this. If that were the correct construction, it would be attended with most mischievous consequences, because this would follow, that whenever the seller was not made aware of the particular and special purpose to which the buyer intended to apply the thing bought, but thought it was for some other purpose, he would be relieved entirely from making any compensation to the buyer, in case the thing was not delivered in time, and so loss was sustained by the buyer; and it would be entirely in the power of the seller to break his contract with impunity. That would necessarily follow,

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if Mr. Coleridge's interpretation of *Hadley* v. *Baxendale* (1) was the true interpretation. My Brother Blackburn has pointed out that that is not the true construction of the language which the Court used in delivering judgment in that case. As I said in the course of the argument, the true principle is this, that although the buyer may have sustained a loss from the non-delivery of an article which he intended to apply to a special purpose, and which, if applied to that special purpose, would have been productive of a larger amount of profit, the seller cannot be called upon to make good that loss if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such larger profit might result; and although, in point of fact, the buyer does sustain damage to that extent, it would not be reasonable or just that the seller should be called upon to pay it to that extent; but to the extent to which the seller contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realised if the article had been delivered would be lost to the other party, to that extent he ought to pay. The buyer has lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied. I think, therefore, that ought to be the measure of damages, and I do not see that there is anything in *Hadley* v. *Baxendale* (1) which at all conflicts with this.

BLACKBURN, J. I am entirely of the same opinion. I think it all comes round to this: The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz. that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller,

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

because if he had known what the consequence would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the non-fulfilment of his contract. On the other hand, if the party has knowledge of circumstances which would make the damages more extensive than they would be in an ordinary case, he would be liable to the special consequences, because he has knowledge of the circumstances which would make the natural consequences greater than in the other case. But Mr. Coleridge's argument would come to this, that the damages could never be anything but what both parties contemplated; and where the buyer intended to apply the thing to a purpose which would make the damages greater, and did not intend to apply it to the purpose which the seller supposed he intended to apply it, the consequence would be to set the defendant free altogether. That would not be just, and I do not think that was at all meant to be expressed in *Hadley* v. *Baxendale.* (1) Here the arbitrator has found that what the defendants supposed when they were agreeing to furnish the derrick was that it was to be employed in the most obvious manner to earn money, which the arbitrator assesses at 420*l.* during the six months delay; and, as I believe the natural consequence of not delivering the derrick was that that sum was lost, I think the plaintiffs should recover to that extent.

MELLOR, J. I am entirely of the same opinion. The question is, what is the limit of damages which are to be given against the defendants for the breach of this contract? They will be the damages naturally resulting, and which might reasonably be in contemplation of the parties as likely to flow, from the breach of such contract. It is not because the parties are not precisely ad idem as to the use of the article in question that the defendants are not to pay any damages. Both parties contemplated a profitable use of the derrick; and when one finds that the defendants contemplated a particular use of it as the obvious mode in which it might be used, I think as against the plaintiffs they cannot complain that the damages do not extend beyond that which they

(1) 9 Ex. 341; 23 L. J. (Ex.) 179. 10 Jur 358

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contemplated as the amount likely to result from their own breach of contract.

Judgment for the plaintiffs accordingly.

Attorneys for plaintiffs: *Galsworthy & Sons.*
Attorneys for defendants: *Evans & Co.*

Jan. 28.

LAKEMAN, APPELLANT; STEPHENSON, RESPONDENT.

Factory Act, 7 Vict. c. 15, s. 22—Accident in a Factory preventing return to work—Duty of Occupier to report.

By 7 Vict. c. 15, s. 22, if any accident occur in a factory which shall cause bodily injury to any person employed therein of such a nature as to prevent him from returning to his work in the factory before nine o'clock the following morning, the occupier of the factory shall, within twenty-four hours of such absence, send notice thereof in writing to the certifying surgeon of the district:—

Held, that any accident taking place in a factory, whether caused by the machinery or not, must be reported; and that if the person injured returns the next morning with the intention of temporarily working, but without the ability to continue at his ordinary work, he is "prevented from returning to his work" within the meaning of the section; and the occupier of the factory is bound to send notice to the surgeon.

CASE stated by Justices of Lancashire, under 20 & 21 Vict. c. 43.

The respondent, a cotton manufacturer, of the Shade, in Todmorden, was summoned by the appellant, one of the sub-inspectors of factories, on an information charging that the respondent being, on the 21st of March, 1867, at Todmorden, the occupier of a certain factory, the same being a factory within the meaning of the Factory Act, 7 Vict. c. 15, a certain accident did then and there occur in such factory, which caused bodily injury to a young person named Jane Greenwood, of the age of fourteen years, employed therein, which was of such a nature as to prevent the person so injured from returning to her work in the factory before nine o'clock of the following morning; that the respondent did not, nor in his absence did his principal agent, within twenty-four hours of the absence of Jane Greenwood, send a notice thereof in writing to the surgeon appointed

to grant certificates of age for the district in which the said factory is situate, contrary to the Factory Act. (1)

It was proved before the justices that the respondent was the occupier of a cotton factory, and subject to all the provisions of the said act, 7 Vict. c. 15. Jane Greenwood was employed in the factory as a weaver; she was a girl under the age of eighteen years, and so registered on the books of the factory.

On the 21st of March, 1867, at half-past five P.M., Jane Greenwood was tripped up by and fell over a rope in the factory, which had been tied across the passage between the looms by a nephew of the respondent, who was employed by him in the factory as a responsible servant, for a practical joke, or, as it was termed, "fooling." In consequence of this fall over the rope, Jane Greenwood was injured and sustained a severe sprain to her right wrist and arm, by her having fallen against a machine in the factory, but which machine was not in motion. Jane Greenwood did not then leave the factory, but remained till six o'clock, in order to await the return of the respondent from Manchester, to tell him of the accident, and did so; and after the accident, and until six o'clock, she endeavoured to keep her looms running, but could not do her usual quantity of work.

Jane Greenwood returned to the factory next morning at five minutes past six o'clock, but she so returned under an arrangement with her mother, that as they were poor, and could not afford the loss of wages which would be consequent on her absence, she should go and "try" to work as she was best able, and remain there until her mother had lighted her fire and performed her domestic duties, when she was to come and take her daughter's place, and work till her recovery, and thus by this arrangement

(1) 7 Vict. c. 15, s. 22:—"That if any accident shall occur in a factory, which shall cause any bodily injury to any person employed therein, which shall have been of such a nature as to prevent the person so injured from returning to his work in the factory before nine of the clock of the following morning, the occupier of the factory, or, in his absence, his principal agent shall, within twenty-four hours of such absence, send a notice thereof in writing to the surgeon appointed to grant certificates of age for the district in which the factory is situated, in which notice the place of residence of the person injured, or the place to which he may have been removed, shall be stated; and the surgeon shall send a copy of such notice to the sub-inspector of the district by the first post after the receipt thereof."

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reduce the loss of wages. The girl could not raise her arm above her waist, or stretch it out, and was obliged to use her knee and mouth and one hand for the purpose of placing her cotton "cop" into the shuttle, with a slight assistance from the injured hand. Her mother came at twenty-five minutes past six and relieved Jane Greenwood, and she was obliged to go home at five minutes after seven o'clock, having remained till that time in order that her mother might shew the respondent the state of the girl's arm. She then left, and put herself under the care of a surgeon, who put her arm in splints, in which it was kept for five days. The girl returned to the factory after the fifth day, but contrary to the advice of her surgeon, and the bandages were not removed from her arm till after the 16th of April.

It was admitted that no notice whatever was sent to the certifying surgeon as mentioned by 7 Vict. c. 15, s. 22; but the respondent contended that, inasmuch as Jane Greenwood did actually return on the morning of the 22nd of March, and as he saw her at her looms, no notice of the accident was required to be given by him to the certifying surgeon.

The appellant contended that the meaning of the words of the act "return to his work" was returning and performing continuously the usual amount of regular work. That as s. 22 enacts that any accident shall be reported which has been of such a nature as to prevent the injured person from returning to his work in the factory before nine o'clock next morning, the words require all accidents, whether from machinery or not, to be reported. That the words of the act also require all accidents to be reported which prevent the injured person from returning to his work; and that the return of Jane Greenwood under the circumstances above detailed, and her attempt to perform work, did not withdraw the case from the operation of s. 22 of 7 Vict. c. 15. Therefore the respondent ought to have sent a notice of the accident to the certifying surgeon.

The justices dismissed the summons on the ground that, as the girl did actually return to her work before nine o'clock of the day following the injury, no notice was required to have been sent by the respondent to the certifying surgeon; the justices were of opinion that it was not for them to look into the quantity of the

work or the quality of it, or whether it was done well or ill, or more or less expeditiously, or whether she continued at her work until breakfast time; but the fact that the girl did come to her work before nine o'clock of the following day was sufficient to justify in law the respondent in not having sent a notice; and that consequently they could not convict him of any offence under s. 22 of the said Factory Act.

If the justices were wrong in having dismissed the summons on the grounds aforesaid, then they submitted to the Court whether this accident was such an accident as was intended by the said section.

It was not proved or alleged that any arrangement existed on the 21st of March between the respondent and Jane Greenwood that she should return to her work before nine o'clock of the morning of the following day, nor that her return was colourable on her part to avoid the necessity for a notice to the factory surgeon.

Sir J. B. Karslake, A. G. (*Hannen* with him), for the appellant. Under 7 Vict. c. 15, s. 22, the occupier of a factory is bound to report any accident in his factory that prevents the person injured from returning to his work before nine the following morning, and it is immaterial whether or not the accident was caused by machinery. Under s. 23, the surgeon is to investigate and report the nature and cause of the accident; and if on investigation it turn out to have been caused by the machinery, the secretary of state, under s. 24, may, at the recommendation of the inspector, direct an action to be brought in the name and for the benefit of the person reported by the inspector to have received bodily injury from the machinery. The policy of the legislature, therefore, clearly was that every accident causing bodily injury should in the first instance be reported. Secondly, the return of the girl to the factory for the few minutes in the morning, in order to keep her loom going till her mother could take her place, is not a returning to work within the meaning of s. 22; there must be the ability, over and above the mere intention to work. It is quite clear the girl was injured so as to have been prevented from returning to her work before nine the next morning. Section 41 shews that knowledge on the

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part of the occupier is unnecessary: he is primâ facie liable to penalties for any transgression against the statute; but knowledge was here shewn, as the respondent knew of the accident and the girl's state the night before, and he also knew she was unable to work in the morning.

The respondent did not appear.

COCKBURN, C.J. I am of opinion that the contention of the appellant is right on both points. The true meaning of s. 22 is that the accident must be reported, unless the person injured is not only able to return the next morning to the factory, but is in a condition to do his ordinary work as usual; and a return of the person with an intention of resuming work, but not in a state to fulfil that intention, is not sufficient. Here, the girl being too much hurt to resume work returned simply with the intention of working or trying to work till her mother was able to come and take her place: she cannot be said to have returned to her work. Now the respondent knew of the accident the night before, and he also knew she was unable to resume her work, for he saw her when she went away at seven the next morning; he had, therefore, full knowledge of the accident. Secondly, s. 22 requires that any accident which takes place in the factory shall be reported; and the fact that the accident was not caused by the machinery does not relieve the occupier from the duty of reporting it to the surgeon, in order that he may ascertain how it was caused.

BLACKBURN, MELLOR, and LUSH, JJ., concurred.

Case remitted accordingly.

Attorneys for appellant: *The Solicitors to the Treasury.*

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Feb. 17.

Contract of Sale—Implied Warranty that Goods shall be in a merchantable condition—Caveat emptor—Measure of Damages.

Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description.

The maxim, caveat emptor, does not apply to a sale of goods where the buyer has no opportunity of inspection.

The plaintiffs, at Liverpool, entered into a contract with the defendant for the purchase of a quantity of Manilla hemp, to arrive from Singapore by certain ships. The ships arrived, and the hemp was delivered to the plaintiffs and paid for; on examination of the bales it was found that they had been wetted through with salt water, and afterwards unpacked and dried, and then repacked and shipped at Singapore. The hemp was not damaged to such an extent as to make it lose its character of hemp; but it was not "merchantable." The defendant did not know of the state in which the hemp had been shipped at Singapore. The plaintiffs sold the hemp by auction as "Manilla hemp with all faults," and it realised 75 per cent. of the price which similar hemp would have fetched if undamaged:—

Held, that there was an implied warranty, on the part of the defendant, to supply Manilla hemp of the particular quality of which the bales consisted in a merchantable condition; and that the plaintiffs were entitled, as damages, to the difference between what the hemp was worth when it arrived and what the same hemp would have realised had it been shipped in a state in which it ought to have been shipped.

FIRST count, that in consideration that the plaintiffs would buy from the defendant certain bales of Manilla hemp, shipped at Singapore, and expected to arrive by certain ships, at a certain price, that is to say, 38*l.* 10*s.* per ton of 2240 lbs. cost freight and insurance, shipping weight, payment to be made in cash against shipping documents, less 2½ per centum discount, on the 21st of October, 1865, the defendant promised the plaintiffs that the hemp should be merchantable, and should be saleable as Manilla hemp, unless it had become unmerchantable and not saleable as Manilla hemp from perils of the seas and navigation after being so shipped from Singapore; that the plaintiffs did buy the hemp from the defendant, and the shipping documents were duly handed by the defendant to the plaintiffs, and that all conditions precedent had been performed. Breach, that the hemp was not merchantable, and the hemp was not saleable as Manilla hemp, and had not become unmerchantable and not saleable as Manilla hemp from

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perils of the seas and navigation after being so shipped at Singapore: alleging special damage.

Second count, that in consideration that the plaintiffs would buy from the defendant certain bales of Manilla hemp, shipped at Singapore, and expected to arrive by certain ships, at a certain price, that is to say, 38*l.* 10s. per ton of 2240 lbs. cost freight and insurance, shipping weight, payment to be made in cash against shipping documents, less 2½ per cent. discount, on the 21st of October, 1865, the defendant promised the plaintiffs that the hemp was in good and merchantable condition when shipped at Singapore; that they did buy the hemp from the defendant, and that the shipping documents were duly handed by the defendant to the plaintiffs, and that all conditions precedent have been performed. Breach, that the hemp, when shipped at Singapore, was not in a good and merchantable condition, and was damaged, spoiled, worthless, and inferior: alleging special damage.

Third count, that by warranting certain hemp to be of average quality, the defendant sold the hemp to the plaintiffs at a certain price, cost freight and insurance. Breach, that the hemp was not of average quality, and was of inferior quality, and valueless to the plaintiffs: alleging special damage.

Fourth count, that the defendant, by warranting certain hemp to be Manilla hemp, and to be saleable as Manilla hemp, sold the same to the plaintiffs at a certain price, cost freight and insurance. Breach, that the hemp was not Manilla hemp, and was not saleable as Manilla hemp, and was valueless to the plaintiffs: alleging special damage.

Pleas: 1st, a denial of the contracts; 2nd, a denial of the alleged breaches.

Issue thereon.

The cause was tried before Blackburn, J., at the Liverpool spring assizes, 1867, when a verdict was found for the plaintiffs, with leave to the defendant to move.

The evidence and course of the trial are fully stated in the judgment of the Court.

A rule having been obtained pursuant to the leave,

June 15, 1867. *Temple, Q.C.*, and *C. Russell* shewed cause.

Jan. 11, 1868. *Brett, Q.C.*, and *Holker* were heard in support of the rule.

The arguments are fully noticed in the judgment of the Court. In addition to the cases noticed in the judgment, the following cases were cited: *Gray* v. *Cox* (1), *Holcombe* v. *Hewson* (2), *Cooper* v. *Twibill* (3), *Burnby* v. *Bollett.* (4)

Cur. adv. vult.

Feb. 17. The judgment of the Court (Cockburn, C.J., Blackburn and Mellor, JJ.), was delivered by

MELLOR, J. In this case, on the trial before Blackburn, J., at Liverpool, it appeared that the plaintiffs, through Messrs. Beneke & Co., their brokers, entered into a contract with the defendant for the purchase of a quantity of Manilla hemp, to arrive.

The sold note was in the following terms:—"Liverpool, 19th Oct., 1865. We have this day sold for you the following goods to Messrs. J. A. Beneke & Co. J.H.V. 200 bales Manilla hemp, expected to arrive p. *Richard Cobden*, @ Singapore, for Liverpool, . . . 309 . . . expected to arrive pr. *Christopher Newton*, @ Singapore for Liverpool, . . . 209 . . . expected to arrive pr. *Fortitude* . . . @ Singapore for London, $\left\{\begin{matrix} \text{H } 193 \\ \text{H H } 1 \end{matrix}\right\}$ . . . expected to arrive pr. *Opher*, @ Singapore for Liverpool, @ 38*l.* 10*s.* pr. ton of 2240 lbs., cost freight and insurance. Shipping weights. Payment, cash against shipping documents on 21st Oct. 1865, less 2½% discount."

The shipping documents were duly delivered to the plaintiffs, and the price was paid. All the vessels named in the contract arrived in due course, with the respective numbers of bales of hemp having marks corresponding to those specified in the contract on board; and the bales were delivered to the plaintiffs. On examination of the bales it was found that the whole of those marked J.H.V. were in such a state as to afford strong evidence that they had at some time, probably from a shipwreck when on the voyage from Manilla to Singapore, been wetted through with salt water, had afterwards been unpacked and dried, and then repacked in the bales which were afterwards shipped at Singapore.

(1) 4 B. & C. 108.
(2) 2 Camp. 391.
(3) 3 Camp. 286, note (*a*).
(4) 16 M. & W. 644.

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Manilla hemp is divided into several qualities. The hemp in the bales in question, if in good condition, would have been what is called "fair current Manilla hemp," which is not the lowest quality; but in all the bales the hemp was damaged to some extent, though not so far as to make it lose the character of hemp.

After some correspondence between the parties, the hemp was sold by auction by the plaintiffs' orders as "Manilla hemp, with all faults," and at the auction it realised about 75 per cent. of the price which similar hemp would have fetched if undamaged. The price of hemp had risen considerably since the contract, so that the proceeds of the sale were very nearly equal to the invoice price. There was no attempt to shew that the defendant knew of the state in which the hemp had been shipped at Singapore.

At the close of the plaintiffs' case, Mr. Brett, for the defendant, contended that, in point of law, under this written contract, there was no further condition or warranty than that the bales on their arrival should answer the description of bales of Manilla hemp, which they did, as was proved by the fact that the hemp, though sold with a stigma upon it, fetched a price only 25 per cent. below that of sound hemp; and that as to quality or condition there was no warranty; that consequently the maxim caveat emptor applied.

The learned judge expressed an opinion adverse to this view. He said:—"I think that the question is for the jury, whether what was supplied under this contract was, when shipped at Singapore, such as to answer the description of *reasonably merchantable* Manilla hemp, that being the warranty which, I think, the law implies in a contract to supply, as this is: though it would be different in a sale of specific things which the purchaser might examine, or of things sold by sample. And I think the question whether it is fairly and reasonably merchantable, is a question of more or less, which must be left to the jury as reasonable men to determine." The judge then reserved leave to move to enter the verdict for the defendant, if there was no evidence to go to the jury of a breach of warranty.

Upon this intimation of opinion, the counsel addressed the jury, and the case was left to them substantially to the effect above stated; and the jury were further told that if they found for the plaintiffs, the damages should be measured by the rate which the

hemp was worth when it arrived compared with the rate which the same hemp would have realised had it been shipped in the state in which it ought to have been shipped: thus, in effect, giving the plaintiffs the benefit of the rise in the market.

The jury found for the plaintiffs, damages 756*l.*

Mr. Brett, in the ensuing Term, obtained a rule to enter the verdict for the defendant, pursuant to the leave reserved; or for a new trial, on the ground of misdirection as to the measure of damages, which he contended ought at most to have been the difference between the value of the article actually delivered, viz., fair average Manilla hemp in a damaged state, and the value of sound Manilla hemp of the lowest quality which might have been supplied at Singapore under this contract. The other objections to the direction were substantially only varied modes of putting the point reserved.

We thought that if the contract had the effect which the direction stated it to have, the true measure of the damages was given, as it put the plaintiffs in the position in which they would have been if the contract had been fulfilled; but we took time to consider the question as to what the contract really was, which is no doubt one of importance and difficulty.

After careful consideration, we are of opinion that Blackburn, J.'s direction was substantially correct. On the argument before us, it was contended that the contract was performed on the part of the defendant by the shipping at Singapore of an article which answered the description of "Manilla hemp," although at that time it was so damaged as to have become unmerchantable. It was said that there being no fraud on the part of the vendor, and both parties being equally ignorant of the past history and actual condition of the article contracted for, and neither of them having had the opportunity of inspecting it, it was the duty of the vendees to have stipulated for a merchantable article if that was what they intended to contract for. In other words, it was said that the maxim, caveat emptor, applied in such a case, in the same way as on a sale of a specific article by a person not being the manufacturer or producer, even though the defect was latent and not discoverable upon examination.

We are of opinion that there is a great distinction between the

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present case and the sale of goods in esse, which the buyer may inspect, and in which a latent defect may exist, although not discoverable on inspection.

The cases which bear upon the subject do not appear to be in conflict, when the circumstances of each are considered. They may, we think, be classified as follows:—

First, where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim caveat emptor applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer: *Parkinson* v. *Lee.* (1) The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment he may if he chooses require a warranty. In such a case, it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of the sale in a market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim caveat emptor applied: *Emmerton* v. *Mathews.* (2)

Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty: *Barr* v. *Gibson.* (3)

Thirdly, where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer: *Chanter* v. *Hopkins* (4), *Ollivant* v. *Bayley.* (5)

Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals,

(1) 2 East, 314.
(2) 7 H. & N. 586; 31 L. J. (Ex.) 139.
(3) 3 M. & W. 390.
(4) 4 M. & W. 399.
(5) 5 Q. B. 288.

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to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: *Brown* v. *Edgington* (1), *Jones* v. *Bright*. (2) In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: *Laing* v. *Fidgeon*. (3) And this doctrine has been held to apply to the sale by the builder of an existing barge, which was afloat but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use: *Shepherd* v. *Pybus*. (4)

If, therefore, it must be taken as established that, on the sale of goods by a manufacturer or dealer to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use, or shall be merchantable, as the case may be, it is difficult to understand why a similar term is not to be implied on a sale by a merchant to a merchant or dealer who has had *no* opportunity of inspection. Accordingly in the case of *Bigge* v. *Parkinson* (5), upon a contract to supply provisions and stores to a ship guaranteed to pass the survey of the East India Company's officers, it was held by the Court of Exchequer Chamber that there was an implied term in the contract, that the stores should be reasonably fit for the purpose for which they were to be supplied, notwithstanding that the vendor had specially contracted that they should pass the survey of the East India Company's officers.

(1) 2 Man. & G. 279.
(2) 5 Bing. 533.
(3) 4 Camp. 169; 6 Taunt. 108.
(4) 3 Man. & G. 868.
(5) 7 H. & N. 955; 31 L. J. (Ex.) 301.

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We are aware of no case in which the maxim, caveat emptor, has been applied where there has been no opportunity of inspection, or where that opportunity had not been waived. The case of *Gardiner* v. *Gray* (1), appears strongly in point to the present. The contract was for the sale of twelve bales of waste silk imported from the continent, and before it was landed samples were shewn to plaintiff's agent, and the bargain was then made, but without reference to the sample. It was purchased in London, and sent to Manchester, and on its arrival there was found to be of a quality not saleable under the denomination of "waste silk." Lord Ellenborough expressed his opinion that "the purchaser under such circumstances had a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity the maxim, caveat emptor, does not apply."

In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not, it is unnecessary to put any other question to the jury; thus, in *Wieler* v. *Schilizzi* (2), and in *Josling* v. *Kingsford* (3), the substantial question put to the jury was, did the goods delivered reasonably answer the description in the contract? And the answer of the jury being that they did not, that answer sufficed to determine each case. In one of those cases there was no opportunity to inspect, in the other there was. So in the case of *Nichol* v. *Godts* (4), where the contract was for the sale of "foreign refined rape oil, warranted only equal to sample," it was held in an action for not accepting the article tendered, that it was necessary for the vendor to establish that it was not only equal to the sample as to quality, but that it was in fact such an article as answered the description of foreign refined rape oil. In *Wieler* v. *Schilizzi* (2), in which there was no opportunity to inspect, and no express stipulation as to quality, it would have been necessary, had the finding of the jury affirmed that the

(1) 4 Camp. 144, 145.
(2) 17 C. B. 619; 25 L. J. (C.P.) 89.
(3) 13 C. B. (N. S.) 447; 32 L. J. (C.P.) 94.
(4) 10 Ex. 191; 23 L. J. (Ex.) 314.

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article delivered did in fact answer the description of "Calcutta linseed," to determine whether the judge ought not to have put the further question, was it reasonably merchantable? It certainly was not determined that such a question would have been wrong, though perhaps the words "tale quale" in that contract might have the effect of excluding any such warranty; and Willes, J., in his judgment (1), said that the purchaser in that case "had a right to expect, not a perfect article, but an article which would be *saleable* in the market as Calcutta linseed."

It appears to us that, in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description. In the words of Lord Ellenborough in *Gardiner* v. *Gray* (2), "Without any particular warranty this is an implied term in every such contract." In the present case the question appears to be, was the article as delivered at Singapore merchantable or saleable in the market under the description of "Manilla hemp?" Blackburn, J., appears to have divided that question into two, viz.:—Was the article, in fact, Manilla hemp? Secondly, was it merchantable? The precise mode of submitting the question is not material, provided the substantial direction was correct, as we think it was.

The counsel for the defendant relied upon a case of *Turner* v. *Mucklow* (3), tried before Mellor, J., in the year 1862, at Liverpool. In that case the plaintiffs were calico printers, and had contracted to sell to the defendant, who was a drysalter and dye extract manufacturer, a boat-load of "spent madder." The defendant, not finding the spent madder supplied suitable for his purpose, repudiated the contract, and refused to pay for it. It appeared that the plaintiffs, in their trade as calico printers, used large quantities of madder roots, having extracted from which the finer colouring matter by chemical processes they placed the refuse or spent madder in a large heap in their yard. They occasionally used portions of it, and by the application of other chemical processes extracted from it a colouring matter called garancine,

(1) 17 C. B. at p. 624. (2) 4 Camp. at p. 145.
(3) 8 Jur. (N.S.) 870; 6 L. T. (N. S.) 690.

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but they did not manufacture spent madder for sale. On a previous occasion they had sold to the defendant, who was a manufacturer of garancine, a small quantity of spent madder from their accumulation; and on the occasion in question the defendant, by letter, bargained with the plaintiffs for a quantity of their spent madder, which he did not inspect before delivery, and upon a portion of it being used by the defendant for the purpose of manufacturing garancine, it turned out that the garancine produced by it was of very inferior quality and unmarketable. The jury were directed that if the article supplied fairly and reasonably answered the description of "spent madder," there was no implied warranty that it was of any particular quality or fitness for any particular use, and upon that direction the jury found a verdict for the plaintiffs; and upon the argument on a rule which was obtained for a new trial, on the ground of misdirection, the Court of Exchequer held the direction to be right; Martin, B., declaring his opinion to be "that no direction was ever more correct."

In that case it is to be observed that the defendant had the opportunity, if he had chosen to avail himself of it, to inspect the heap of spent madder; he knew that it was the refuse madder after it had gone through the plaintiffs' processes, and that it was not manufactured for sale. These circumstances entirely distinguish that case from the present.

The counsel for the defendant also relied upon the statute 19 & 20 Vict. c. 60, s. 5 (1), as a sort of implied legislative declaration of the law of England upon that subject in favour of his argument; but, upon examining the section referred to, it does not appear to bear out that view, for all that it declares is, that a seller of goods, without knowledge that they are defective or of bad quality, shall not be held to have warranted their quality or sufficiency.

(1) 19 & 20 Vict. c. 60, s. 5:—"Where goods shall after the passing of this act be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods with all faults shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered without such warranty to warrant that the same are fit for such purpose." [This statute applies only to Scotland.]

It has already appeared that there is not in general, on the sale of goods in England to be supplied, an implied warranty that they shall be of any particular quality or sufficiency for any particular purpose, but merely that they shall be merchantable goods of the description bargained for. The present case depends on the distinction between a sale of particular articles and a contract to supply articles of a particular kind.

The authority of Chancellor Kent (1) was also appealed to; but as the American cases which he cites are generally adverse to his opinion, it can at most be said that the opinion of an eminent writer is opposed to the authority of the cases which he cites.

It appears to us, in the result of this case, that the maxim of caveat emptor cannot apply, and that it must be assumed that the buyer and seller both contemplated a dealing in an article which was merchantable. The buyer bought for the purpose of sale, and the seller could not on any other supposition than that the article was merchantable have found a customer for his goods, and the buyer must be taken to have trusted to the judgment, knowledge, and information of the seller, as it is clear that he could *exercise no judgment of his own;* and this appears to us to be at the root of the doctrine of implied warranty, and that in this view it makes no difference, whether the sale is of goods specially appropriated to a particular contract, or to goods purchased as answering a particular description.

It was contended further by the defendant's counsel that the shippers at Singapore were the persons who selected the goods in question, and that the defendant, who merely sold them to arrive, was as little aware of their true condition when shipped as the plaintiffs; but it is clear that the defendant, if not directly connected with the shippers as his correspondents, must at least have purchased from them, and had recourse against them for not supplying an article reasonably merchantable.

The remarks of Cockburn, C.J., on the argument in *Bigge* v. *Parkinson* (2), though not in terms repeated by him in delivering the judgment of the Court of Exchequer Chamber, are really involved in it, and are very closely in point here.

(1) Kent's Commentaries, vol. ii.; p. 479 of the 6th ed., the last by the author himself. 11th ed., pp. 633–635,

(2) H. (7) & N. at p. 959.

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We are therefore of opinion that Blackburn, J.'s direction was right, and that this rule must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Thomas & Hollams.*

Attorneys for defendant: *Wright & Venn, for R. J. Jones, Liverpool.*

Jan. 18.

AUSTIN, APPELLANT; OLSEN, RESPONDENT.

Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 257, 525—*Attempt to persuade Seaman to neglect to join Ship—Limitation of Time of instituting summary proceedings.*

The Merchant Shipping Act, 1854, s. 257, makes it an offence to persuade or attempt to persuade any seaman to neglect or refuse to join, or to desert from his ship; by s. 525 no conviction for any offence shall be made under this act in any summary proceeding, unless such proceeding is commenced within six months after the commission of the offence; or if both or either of the parties to such proceeding happen during such time to be out of the United Kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same:—

Held, that "parties to the proceeding" meant the seaman and the person persuading or attempting to persuade; and that if either of them leaves the kingdom during the six months after the commission of the offence an information may be laid within two months of his return:—

Held also, that the offence might be committed although the formalities, required by s. 150, in the engagement of the seaman, had not been complied with.

CASE stated by Justices of Cardiff, under the 20 & 21 Vict. c. 43.

The appellant, on the 19th of November, 1866, was convicted on an information, under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 257 (1), for that he did unlawfully attempt to

(1) 17 & 18 Vict. c. 104, s. 257:—Every person who by any means whatever persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join, or to proceed to sea in, or to desert from his ship, or otherwise to absent himself from his duty, shall for each such offence in respect of such seaman or apprentice, incur a penalty not exceeding ten pounds; . . .

Section 525. The time for instituting summary proceedings under this act shall be limited as follows: that is to say—

(1.) No conviction for any offence shall be made under this act in any summary proceeding instituted in the United Kingdom, unless such proceeding is commenced within six months after the commission of the offence; or if both or

persuade the respondent, a seaman lawfully engaged on board a vessel called *England's Rose*, to neglect to join his ship.

On the 4th of April, 1866, Israel Olsen, the respondent, signed an agreement at the office of a shipbroker at Cardiff to serve as a seaman on board the British ship *England's Rose*, as a substitute for one of her crew who had deserted. Shortly afterwards, about five o'clock in the afternoon of the same day, Olsen was asked by the appellant to join a ship called the *Etta*. He refused, stating that he had shipped in the *England's Rose*. The appellant repeated his request, but without success, and Olsen sailed the next morning, but at what exact time the evidence did not shew. He returned to England at the end of October, 1866, having been continuously absent since he sailed from Cardiff on the 5th of April.

The information was laid on the 14th of November, 1866.

At the hearing the appellant objected that the information was not laid in due time, inasmuch as Olsen, one of the parties, was, at the time of the commission of the offence, and for some time after, not out of the United Kingdom, and ought therefore to have commenced the proceedings within six months from the 4th of April.

The justices considered that, as Olsen could not have stayed in this country to institute proceedings without, in some way more or less disadvantageous to him, putting an end to his contract to serve in the *England's Rose*, and considering that, except for a very short time (probably not so much as twenty-four hours), he was actually out of the United Kingdom for the whole period of six months, the case might be held to be within the last half of the clause, and consequently that the information, being laid within the allowed period of two months, was in time.

It was also contended that Olsen was not a seaman lawfully engaged to serve in the *England's Rose*, within the meaning of ss. 243 and 257.

According to the fourth paragraph of s. 150 (1), the engagement of Olsen as a substitute ought, if practicable, to have been made

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either of the parties to such proceeding happen during such time to be out of the United Kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same:

(1) Section 150. (4.) In the case of substitutes engaged in the place of sea-

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before the Superintendent of Mercantile Marine, or his deputy; and that being impracticable, the agreement should have been read over and explained to him, and signed in the presence of an attesting witness. It was shewn, to the satisfaction of the justices, that it was not practicable to engage the man before the regular official; and it also appeared that the agreement was signed in the presence of an attesting witness, but there was no evidence to shew that the agreement had been read over and explained, both Olsen and the attesting witness forgetting whether that had been done or not. The justices presumed that formality was observed, and held that the agreement was lawfully made. (1)

The respondent did not appear.

Waddy, for the appellant, urged the two objections stated in the case.

BLACKBURN, J. I do not think either of these objections can prevail. The appellant was convicted of having attempted to persuade the respondent to neglect to join his ship. The offence was committed on the 4th of April; on the 5th the respondent sailed from England and did not return until the end of October, more than six months after the commission of the offence. The information was laid on the 14th of November. The question is, were the proceedings against the appellant commenced in time? That depends upon the construction of s. 525 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which enacts that "no conviction for any offence shall be made under this act in any summary proceeding instituted in the United Kingdom, unless such proceeding is commenced within six months after the commission of the offence; or if both or either of the parties to such proceeding

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men, who have duly signed the agreement, and whose services are lost within twenty-four hours of the ship's putting to sea, by death, desertion, or other unforeseen cause, the engagement shall, when practicable, be made before some shipping master duly appointed in the manner hereinbefore specified; and whenever such last-mentioned engagement cannot be so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to the seamen; and the seamen shall thereupon sign the same in the presence of a witness who shall attest their signatures.

(1) There was no question submitted to the Court.

happen during such time to be out of the kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same." What is the meaning of the words "both or either of the parties to such proceeding?" Literally, the complainant or the person in whose name the information is laid is a party to the proceeding, but it would seem that any one might lay the information, for I do not find that the complaint must be made by the party aggrieved. But it would lead to an absurdity, if we were to put so wide a construction on the word "parties." I think parties must be taken to mean the person committing the offence and the person against whom the offence is committed. If either of these two happen to be out of the kingdom "during such time," that is, during the currency of the six months, proceedings may be commenced within two months of his return. It is not a perfect enactment, the time sometimes may be too long, and sometimes too short, but in the majority of these cases the offence is committed when seamen are about to leave the country, and the legislature never intended that, if the seaman who was persuaded to leave the ship was absent for six months, the offender should escape punishment. The enactment does not mean that the time is to begin to run the moment the offence is committed, and that after six months no proceedings are to be taken. There really is nothing in the other point.

MELLOR, J. I am of the same opinion on both points. If, in construing the enactment, we decided the latter point in favour of the appellant, it would lead to serious consequences. It would be a monstrous thing if a man, who had induced a seaman to break his engagement, should escape punishment because certain formalities in engaging the seaman had not been complied with. It might be that if the seaman himself chose to take the objection he might be free from his agreement, but, as against the person who solicits him to break his engagement, it is perfectly immaterial whether all the formalities required by the statute have been observed. With reference to the other point, we must endeavour to put a reasonable construction on a section, the language of which is open to much doubt: and I think the construction which my Brother Blackburn has suggested is reasonable. When

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both parties, the person who solicits and the person who is solicited, are in the country for six months after the offence, then six months is the limit within which the proceedings instituted must be commenced; but if during the six months one of them leaves the country, so that no proceedings can be taken effectually, then the section intends that a further period of two months should be allowed after the return of the absent person and both parties are at one time in this country. This construction meets the general objects of the section; but that contended for by the appellant would, in the majority of cases, defeat them.

LUSH, J. I am of the same opinion. No doubt there are difficulties in the way of a satisfactory construction of the section, but I think upon the whole the more reasonable construction is that at which we have arrived. The statute gives six months for instituting the prosecution, provided the seaman and the person to be prosecuted remain during that time in the country, but if that period of six months is broken by either going out of the country, then the section gives a further time of two months.

Conviction affirmed.

Attorney for appellant: *T. H. Smith, for T. H. Ensor, Cardiff.*

Jan. 27.

WEEKS *v.* WRAY.

Practice—Interpretation of Order to proceed without personal service of Writ of Summons—Time, how to be computed—Common Law Procedure Act, 1852 (15 *&* 16 *Vict. c.* 76), *ss.* 17, 29.

A judge's order, that "three days after the service of this order at defendant's residence, the plaintiff be at liberty to proceed as if personal service of the writ of summons had been effected on defendant," was served at the defendant's residence on the 20th of December, and no appearance having been entered by the defendant, the plaintiff signed judgment on the morning of the 23rd of December:—

Held, that, under the order, the defendant had to the end of the 23rd to enter an appearance, and that the judgment ought not to have been signed till the 24th of December.

THE plaintiff in this action, having been unable to effect personal service of the writ of summons upon the defendant, on the 18th

of December, 1867, obtained a judge's order under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 17, which was in the following terms:—"It is ordered that three days after service of a copy of this order at defendant's residence, the plaintiffs be at liberty to proceed in this action as if personal service of the writ of summons had been effected upon defendant."

The order was served at the defendant's residence on Friday, the 20th of December, and on the morning of Monday, the 23rd, no appearance having been entered by the defendant, the plaintiff signed judgment. Later in the same day the defendant entered an appearance, and obtained an order of one of the masters setting aside the judgment and all subsequent proceedings, on the ground that the judgment had been signed too soon; and Lush, J., at chambers refused to rescind the order.

J. O. Griffits now moved for a rule calling on the defendant to shew cause why the master's order should not be set aside. The master held that the judgment ought not to have been signed until the 24th of December; but the order gives liberty to the plaintiff to proceed three days after the service of the writ, and as the service was on the 20th of December, according to the usual rule applicable to such cases, that the days are to be reckoned exclusive of the first and inclusive of the last, the plaintiff was entitled to sign judgment on the 23rd.

[LUSH, J. I thought, looking at s. 29 of the act (15 & 16 Vict. c. 76), that in such a case the meaning of the order must be taken to be that the three days were given to the defendant for entering an appearance.

COCKBURN, C.J. One must look at the object and subject matter of the order, to give the proper interpretation; and rule 174 of Reg. Gen. Hil. T., 1853, says, that the days are to be reckoned exclusive of the first day and inclusive of the last day; and thus the defendant would have the whole of the 23rd to enter an appearance; and the plaintiff could not sign judgment till the 24th.]

F. Brandt appeared to shew cause in the first instance, but was not heard.

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Per curiam (COCKBURN, C.J., BLACKBURN, MELLOR, and LUSH, JJ.)

Rule refused.

Attorney for plaintiff: *Harper.*
Attorney for defendant: *Bowen May.*

Jan. 27.

FRAY *v.* VOULES.

Practice—Order to proceed in formâ pauperis takes effect from service only.

Judgment having been entered for the defendant, the plaintiff took proceedings in error, and then obtained an order to proceed in formâ pauperis; after judgment had been affirmed, she served a copy of the order on the defendant:—
Held, that the defendant was entitled to his costs of the proceedings in error: for that the order only took effect from the date of the service.

RULE obtained by the plaintiff calling on the defendant to shew cause why the master's allocatur for the costs of the proceedings in error taxed to the defendant should not be set aside, on the ground that the plaintiff was proceeding in formâ pauperis.

The action, which was for the alleged negligence of the defendant as the plaintiff's attorney, was tried in August, 1860, and a verdict found for the defendant on all the issues; in the next Michaelmas Term the plaintiff applied for a new trial, but the rule was refused; and judgment was entered up for the defendant.

On the 10th of March, 1866, the plaintiff commenced proceedings in error; and on the 2nd of June, 1866, a judge's order was made, allowing the plaintiff to prosecute the action in formâ pauperis.

The case was heard in the Exchequer Chamber on the 14th of June, 1866, and the judgment at once affirmed; on the same day the defendant's managing clerk, when leaving the Court after judgment had been pronounced, was served by the plaintiff with a copy of the order to proceed in formâ pauperis; and this was the first notice or knowledge that the defendant or any of his clerks had of the order, as they made affidavit; the plaintiff, however, made affidavit that she put a copy of the order into the letter-box at the defendant's office on the 9th of June. On the 3rd of August, the defendant taxed his costs of the proceedings in error.

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Joyce shewed cause.

The plaintiff supported the rule in person.

COCKBURN, C.J. There is a well known principle that the process of the Court shall not be allowed to be abused, but there would be this abuse, if a party could keep an order like this back till the last stage of the proceedings had arrived, so as to be able to make use of it or not, according as the event of the proceedings was one way or the other. If the order had been brought to the notice of the defendant, his very first step would have been to get the order set aside; and as the plaintiff's proceedings were absolutely vexatious, the Court might, on the defendant's application, have rescinded the order. On the disputed fact as to the time when the service of the order was first made on the defendant, I have no hesitation in saying I believe it not to have been made till after the judgment was pronounced in the Exchequer Chamber; and on the point of law I hold that the order only inures from the time of service.

BLACKBURN, J. This is a point of some general importance. When a litigant is admitted to proceed in formâ pauperis, he is not liable to costs, and on the other hand he can get none from his opponent. From what time does the admission take place when an order has been obtained and not served? Surely as against the person who professes to be a pauper, not till the order has been served on the opposite party; so that he may have an opportunity, as is but just and right, to get the order set aside. On the other hand, if the order took effect from its date irrespective of service, the person obtaining it might keep it back until the event of the cause were decided, so as to be able to say, if successful, I am entitled to costs, and if the event is against him, I am suing as a pauper, and cannot be compelled to pay costs.

MELLOR, J. I agree with the Lord Chief Justice on both points.

LUSH, J. I entirely concur in thinking that the only proper view is that the order must be served before it can take effect, and that it then takes effect only from the time of service.

Rule discharged with costs.

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THE QUEEN *v.* THE INHABITANTS OF THE TOWNSHIP OF IPSTONES.

Highway—Indictment for non-repair—Costs of Prosecution—5 & 6 Wm. 4, c. 50, s. 95—Certiorari—5 W. & M. c. 11, ss. 2, 3.

Where an indictment, ordered by justices, under 5 & 6 Wm. 4, c. 50, s. 95, to be preferred at the next assizes against the inhabitants of a township, is removed by the defendants by certiorari into the Court of Queen's Bench, and is tried at nisi prius, and a verdict is found for the defendants, the presiding judge has no power, under the above section, to order the payment of the costs of the prosecution out of the highway rate: the section giving the power only to the judge of assize, that is, the judge sitting under the commission of oyer and terminer.

Reg. v. *Eardisland* (3 E. & B. 960; 23 L. J. (M. C.) 145) dissented from.

INDICTMENT for the non-repair of a highway situate in the township of Ipstones, in the county of Stafford.

Plea: that one John Sneyd was liable to repair by reason of his tenure of certain lands and tenements called Intake Wood, in the township of Ipstones.

The indictment was preferred under an order of justices of 21st of March, 1866, by virtue of 5 & 6 Wm. 4, c. 50, s. 95 (1), at the Stafford summer assizes, 1866, and a bill having been found, it was on the 23rd of March, 1867, removed by certiorari into the Court of Queen's Bench; the recognizances were entered into on behalf of the defendants on the 5th of April.

(1) 5 & 6 Wm. 4. c. 50, s. 95, enacts, "That, if on the hearing of any such summons respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish, or the party to be named in such order, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this act in the parish in which such highway shall be situate: Provided, nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to remove such indictment by certiorari, or otherwise, into His Majesty's Court of King's Bench."

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At the trial at nisi prius, before Mellor, J., at the following summer assizes, a verdict was found for the defendants; and an application was then made to the judge for an order, under s. 95, directing that the costs of the prosecution be paid out of the highway rate. The judge declined to make an order; and it was ultimately agreed between the parties that the application should be made to the Court.

Huddleston, Q.C. (*J. O. Griffits* with him), moved for a rule accordingly. It is admitted on the record that the road in question is a highway, it is therefore imperative on the judge who tried the indictment to direct that the costs should be paid out of the highway rate. The authorities on the point are *Reg.* v. *Yarkhill* (1); *Reg.* v. *Great Broughton* (2), and *Reg.* v *Haslemere* (3); and they shew that the judge has no discretion in the matter. In Chitty's Statutes, title Highway, in a note to 5 & 6 Wm. 4, c. 50, s. 95, it is laid down: A judge at nisi prius is empowered by this section to make an order for payment of the costs of the prosecution, though the indictment has been removed from the sessions by certiorari; and for this position the cases of *Reg.* v. *Great Broughton* (2), *Reg.* v. *Pembridge* (4), *Reg.* v. *Watford* (5), are cited; and the recent case of *Reg.* v. *Eardisland* (6) is a direct authority for the prosecutor.

A. S. Hill shewed cause in the first instance. There are three tribunals before which an indictment for the non-repair of a highway may be tried. It may be tried at the "next assizes" before the judge of assize, that is the judge who sits, not under a commission of assize, but under a commission of oyer and terminer, and it is therefore the judge of the court of oyer and terminer that is meant; or it may be tried at the quarter sessions; or it may be removed by certiorari and tried before a judge at nisi prius. The costs of the prosecution may be ordered, under s. 95, to be paid out of the highway rate where the indictment is tried before the first two tribunals; but the section does not apply where the indictment is tried before a judge at nisi prius. In that case the

(1) 9 C. & P. 218.
(2) 2 Moo. & Rob. 444.
(3) 3 B. & S. 313; 32 L. J. (M. C.) 30.
(4) 3 Q. B. 901.
(5) 4 D. & L. 593.
(6) 3 E. & B. 960; 23 L. J. (M. C.) 145.

9 Jur. N.S. 573.

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costs must be recovered under the 5 W. & M. c. 11, s. 3 (1), which provides that if the defendant prosecuting a writ of certiorari be convicted, the Court shall give reasonable costs to the prosecutor; or if the defence made to the indictment be frivolous or vexatious, the prosecutor would be entitled to his costs under s. 98 of the Highway Act, 5 & 6 Wm. 4, c. 50. The judge, therefore, was right in refusing to make an order that the costs of the prosecution be paid out of the highway rate: *Reg.* v. *Paul.* (2)

Huddleston, Q.C., in support of the rule. According to the argument for the defendants, if the indictment is removed by certiorari, unless the prosecutor succeeds, he would never get costs. The cases decide that, if the road be a highway, the prosecutor, whether he succeed or not, is entitled to his costs out of the highway rate, and it is imperative on the judge who tried the indictment to make the order: *Reg.* v. *Heanor* (3); *Reg.* v. *Preston.* (4)

COCKBURN, C.J. This rule must be discharged on the ground that an indictment for the non-repair of a highway, removed by certiorari into this Court, is not within s. 95 of 5 & 6 Wm. 4, c. 50. If a highway is out of repair, the surveyor of the parish may be summoned before the justices, and if, on behalf of the inhabitants, he deny their liability to repair the highway, the justices are required to direct a bill of indictment to be preferred at the next assizes, or at the next general quarter sessions, and the costs of such prosecution shall be directed by the judge of assize

(1) 5 W. & M. c. 11, s. 3, enacts, "That if the defendant prosecuting such writ of certiorari be convicted of the offence for which he is indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tythingman, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them, as officer or officers, to prosecute or present, which costs shall be taxed according to the course of the said court, and that the prosecutor, for the recovery of such costs, shall, within ten days after demand made of the defendant and refusal of payment on oath, have an attachment granted against the defendant by the said court for such his contempt; and that the said recognizance shall not be discharged till the costs so taxed shall be paid."

(2) 2 Moo. & Rob. 307.

(3) 6 Q. B. 745.

(4) 7 Dowl. 593.

before whom the indictment is tried, or by the justices at quarter sessions, to be paid out of the highway rate. It is quite plain that the intention of the legislature was, that where a complaint was made before justices, and they saw that the highway was out of repair, they should direct an indictment to be preferred, and whoever should have to prefer the indictment should be indemnified as to all costs he might incur. So important was it for the public that the highway should be kept in repair, that it was the intention of the legislature that the person directed to prosecute should not have to pay costs. But the right of the party charged to remove the indictment by certiorari was left untouched. This indictment has been removed by certiorari, and is subject to all the incidents which attach to its removal. The judge who tries the indictment tries it as the representative of this Court, and when the indictment is removed, it is on condition that the person removing it shall enter into a recognizance to pay the costs of the defeated party. It may be that those who framed s. 95 had not the present case in their minds, or did not consider how that section would affect the course of an indictment removed by certiorari. I do not think that the legislature intended that the prosecutor should have his costs if the indictment was tried before the judge of assize or at quarter sessions, and be deprived of them if tried by a judge at nisi prius; nevertheless, if the legislature have failed to express their intention, we cannot give effect to it. When I read s. 95, I think the legislature has in terms confined the enactment to the case of an indictment for the non-repair of a highway tried in the ordinary manner, and has not included the case of an indictment tried at nisi prius. In the latter case the judge is not a judge of assize, but a judge of nisi prius. When the indictment is tried before the judge of assize, the costs are to be paid out of the highway rate; but where it is removed by certiorari, the person entering into a recognizance is liable for the costs. The section imposes the duty of awarding costs on the judge of assize, and does not apply to a judge sitting at nisi prius. I feel by our decision that we are overruling the case of *Reg.* v. *Eardisland* (1); but this point was very cursorily mentioned, and decided without much consideration. I am of

(1) 3 E. & B. 960; 23 L. J. (M.C.) 145.

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opinion that s. 95 does not apply, and that it was not incumbent on the judge who tried this indictment to award the costs of the prosecution to be paid out of the highway rate.

BLACKBURN, J. I am of the same opinion. The distinction between this and the other cases turns on the fact that this case is removed by certiorari and my Brother Mellor tried the indictment at nisi prius for this Court. Section 95 is peculiarly worded. The intention of the legislature was that when a highway is out of repair, the surveyor might be summoned before justices, and if the highway was out of repair the justices were to make a summary order to have it put in repair, unless he disputed the liability of the parish to repair, and in that case the justices, the section says, "are hereby required to direct a bill of indictment to be preferred against the inhabitants of the parish or the party to be named in the order." Whether that would authorize the justices to direct an indictment to be preferred against a person who is the applicant, does not arise. The section proceeds: "And the costs of such prosecution shall be directed by the judge of assize before whom the indictment is tried, or by the justices at quarter sessions, to be paid out of the highway rate." Whether there is a discretion in the judge of assize to make the order, or whether it is imperative on him to make it, is a question of great difficulty, which it is unnecessary to decide. I think if the legislature contemplated the present case, they never would have used the words in s. 95, which are restricted to a trial before a judge of assize or at quarter sessions, and those tribunals alone are empowered to make an order for costs. There are no words in the section which relate to the costs of a trial at nisi prius, and such costs are not provided for by the statute. Perhaps it is casus omissus, or perhaps the legislature thought that the costs were sufficiently provided for by the 5 W. & M. c. 11, s. 3, which empowers the court, when the defendant is convicted, to give reasonable costs to the prosecutor if he be the party grieved or injured. The words "party grieved or injured" might, I think, apply to the surveyor or inhabitants of a parish. The legislature may have thought that if the indictment was of sufficient importance to be removed by certiorari, the person prosecuting the writ would make himself

personally liable for the costs; and therefore, in s. 95, made no provision for his costs: at any rate, there are no words in that section which authorizes a judge who tries an indictment at nisi prius to direct the payment of costs out of the highway rate. No doubt the case of *Reg* v. *Eardisland* (1), is a decision to the contrary; but the point there was only mooted, and not very carefully considered. That case, however, did in effect decide this question. As it could not be taken to a court of error, if we think it wrongly decided, we are not bound by it. My opinion is, that a judge, sitting at nisi prius, and trying an indictment for the non-repair of a road which has been removed by certiorari, has no power to order the costs to be paid out of the highway rate.

MELLOR, J. Sitting at nisi prius I should certainly have considered myself bound by *Reg.* v. *Eardisland.* (1) The question, however, was hardly argued and was summarily disposed of; and I do not think it a satisfactory decision. I agree that s. 95 may, for some purposes, be a difficult section to construe, but it contains no words which empower a judge, sitting at nisi prius, and trying an indictment removed by certiorari, to order payment of the costs of the prosecution out of the highway rate. When an indictment is brought before this Court by certiorari, certain incidents attach to its removal; one of them is, that the defendant, if unsuccessful, shall pay the costs of the trial, but in this case the defendants have succeeded, and the prosecutor can therefore recover no costs.

LUSH, J. I do not think that the decision in the case of *Reg.* v. *Eardisland* (1) is satisfactory: the question which is now before us not having been pointedly brought before the Court, and as it is a case which did not admit of an appeal, we are at liberty to reconsider the question and put what we think the proper construction upon the statute. By s. 95, the authority to direct payment of the costs of the prosecution out of the rate is given to the judge of assize before whom the indictment is tried, when tried at the assizes, and to the justices of the quarter sessions if tried there.

(1) 3 E. & B. 960; 23 L. J. (M. C.) 145.

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Does the description "judge of assize" include the judge sitting on the civil side, so as to comprehend the case of an indictment removed by certiorari and entered as a record of nisi prius, or does it point exclusively to the judge to whom the designation "judge of assize" properly belongs, viz., the judge sitting under a commission of oyer and terminer? I am of opinion that it means the latter, and contemplates a trial of the indictment on the criminal side only, and that for two reasons: First, because the proviso of s. 95, which gives, or rather preserves to the party against whom the indictment is preferred, the right to remove it into this court by certiorari, is silent as to the costs after the removal. I do not know why the proviso is limited to indictments found at the sessions, nor is that point material in the present case; what is significant and to the point is, that it leaves the costs in such a case apparently to be governed by the Certiorari Act, 5 W. & M. c 11. Secondly, because to hold that the enactment applies to the trial of an indictment at nisi prius would exclude certain cases from its operation, and thus make distinctions for which no reason can be assigned. The enactment is clearly confined to trials at assizes; now there are no assizes in this county, the county of Middlesex. If an indictment found at sessions in this county were removed by certiorari, it would be tried in this court, and in such a case, if the costs were not governed by the act of 5 W. & M., the prosecutor could not in any case have his costs. The same observation applies to the county palatine. I am therefore of opinion that the section applies only to indictments tried in the criminal court, and when removed by certiorari, costs can only be claimed under the recognizance given as required by the Certiorari Act.

Rule discharged.

Attorney for prosecution: *W. Holt.*
Attorneys for defendants: *Blagg & Son, Cheadle.*

[IN THE EXCHEQUER CHAMBER.]

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Feb. 4.

WOOD *v.* BOOSEY AND ANOTHER.

Copyright—International Copyright Act (7 *Vict. c.* 12), *s.* 6, *Author or Composer —Arrangement for the Pianoforte of Score of an Opera.*

By the International Copyright Act, 7 Vict., c. 12, s. 6, no author, or his assigns, of any musical composition first published in a foreign country, shall be entitled to the benefit of the act, unless, within the time mentioned in the order of council applying to that country, the musical composition shall have been registered with the following particulars: inter alia, name and place of abode of the author or composer.

N. composed and published an opera in full score at Berlin, and after his death B. arranged the score of the whole opera for the pianoforte; in registering this arrangement in England, N.'s name was inserted as composer:—

Held, affirming the judgment of the Queen's Bench, that the arrangement for the pianoforte was an independent musical composition, of which B., not N., was the composer; and the entry made under s. 6 was invalid, and gave no title to the assignee of the registered composition.

APPEAL by the plaintiff from the decision of the Court of Queen's Bench discharging a rule to set aside a nonsuit and enter a verdict for the plaintiff. (1)

The action was brought for the infringement by the defendants of the copyright, of which the plaintiff was the assignee, in four books or musical compositions. The argument and the judgment of the Court are confined to the infringement alleged in the first count, viz., that of the copyright in a musical composition called "Die Lustigen Weiber von Windsor, Komische Oper, composed by Otto Nicolai, Pianoforte Score;" and it is not necessary to refer to the others.

By s. 2 of the International Copyright Act (7 Vict. c. 12), the Queen may, by order in council, direct that authors of books (which by s. 20 includes musical compositions) first published in any foreign country to be named in such order, and their assigns, shall have copyright in such books within her Majesty's dominions. By s. 3, the copyright law as to books first published in this country is to apply to the books to which the order extends, and which shall have been registered as thereinafter is provided. And s. 6 enacts, that no author of any book, or his executors, adminis-

(1) Law Rep. 2 Q. B. 340.

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trators, or assigns, shall be entitled to the benefit of that act, or of any order in council to be issued in pursuance thereof, unless within a time or times to be in that behalf prescribed in each such order in council, such book, or musical composition, shall have been so registered, and such copy thereof shall have been so delivered as thereinafter mentioned: that is to say, as regards such book, or musical composition, in the event of the same having been printed, the title to the copy thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor of the copyright thereof, the time and place of the first publication in the foreign country named in the order in council under which the benefits of that act shall be claimed, shall be entered in the register book of the Company of Stationers in London, and one printed copy of the whole of such book shall be delivered to the officer of the said company.

At the trial, before Cockburn, C.J., at the sittings in Middlesex, after Michaelmas Term, 1865, the following facts were admitted or proved:—By an order in council of the 1st of September, 1846, the benefit of the act was extended to Prussia, provided that books, &c., were registered, as required by the act, within twelve calendar months after the first publication in Prussia. The opera book or musical composition of the whole opera in question had been composed by Otto Nicolai, at Berlin in Prussia, and he had assigned his copyright to Messrs. Bote and Bock, a firm of music-sellers of that town. Bote and Bock published the pianoforte score of the opera, and then made an entry of the work in the registry book at Stationers' Hall, under s. 6 of 7 Vict. c. 12, as follows:—

Time of Making Entry.	Title of Book.	Name and Place of Abode of the Author or Composer.	Name and Place of Abode of the Proprietor of the Copyright.	Time and Place of First Publication.
Oct. 4th, 1851.	Die Lustigen Weiber von Windsor, Komische Oper. Composed by Otto Nicolai. Pianoforte Score.	Otto Nicolai, Berlin.	Ed. Bote and G. Bock, Berlin.	Berlin, 1st Sept. 1851.

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The property in the opera and score is now vested by assignment in the plaintiff, who has, if the requirements of the Copyright Amendment and International Copyright Acts have been complied with, title to sue for an infringement in this country. The defendants had published in this country the pieces in respect of which copyright was claimed.

The defendants, in their notice of objections, under 5 & 6 Vict. c. 45, s. 16, had objected that the book or musical composition mentioned in the first count was arranged, composed, or written by Ferdinand Frederick Brissler; a witness called by the plaintiff, in substance stated that the opera was first performed on the 9th of March, 1849, that Otto Nicolai died in May, 1849, and F. F. Brissler in the years 1850-51 arranged for Bote and Bock, of Berlin, the pianoforte score from the original opera.

Amongst other objections, it was objected that the entry of October 4, 1851, which purported to be made in compliance with s. 6 of 7 Vict. c. 12, was insufficient by reason of stating that Otto Nicolai was the composer of the pianoforte score, whereas Brissler, not Nicolai, was the composer.

The chief justice, upon this and other objections, nonsuited the plaintiff, giving him leave to move to enter a verdict.

In Hilary Term, 1866, a rule was obtained to set aside the nonsuit and enter a verdict for the plaintiff, on the ground that the copyright in the opera had been properly registered under the copyright acts, and in Hilary Term, 1867, the Court of Queen's Bench discharged the rule. (1)

Parry, Serjt. (*Patchett* and *Popham Pike* with him), for the plaintiff. One of the grounds on which the Court of Queen's Bench upheld the nonsuit was, that the pianoforte score of the opera had been registered in the name of Nicolai, as the author, whereas not he but Brissler was the author, and the work ought therefore to have been registered in Brissler's name. The judgment of Cockburn, C.J., proceeded on the ground that the arrangement for the pianoforte was a separate and distinct work, which required skill, labour, and musical knowledge: that is a mistake.

(1) Law Rep. 2 Q. B. 340.

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The pianoforte score contains three lines of music; the first for the voice, the second for the treble, and the third for the bass on the piano. The notes for the voice are identically the same as in the original opera, but the pianoforte accompaniment is a condensation for the piano of the whole music played by the orchestra; the notes are not the same, because it is an arrangement for one instrument; but the airs are the same, the melodies are preserved, and the adaptation would take precisely the same time to play as the original opera. Brissler has not created any new thing which entitles him to register the work in his own name; he has merely copied for the piano the work which Nicolai had composed for the whole orchestra. He was the servant of Bote and Bock, who were legal representatives of Nicolai, employed by them to arrange the pianoforte score. The arrangement is mechanical, not requiring much skill. What Brissler did is no more the invention of Brissler than a play of Shakspeare, edited for the stage, would be the work of the editor. Brissler, therefore, was not the author within the meaning of the copyright acts. There can be no doubt it was Nicolai's mind that created the opera; Brissler may have done something more than Nicolai did by adapting it to the pianoforte, but still he is not the author; he has shewn no inventive power, he has not created a single melody. Brissler has substantially done for Bote and Bock what Hatton did for Kean, in *Hatton* v. *Kean* (1), and in that case it was held that Hatton having been employed by Kean to compose the music as part of the representation of a dramatic piece, Hatton was not an author within the copyright acts. Brissler could not have made the arrangement without Nicolai's consent, or if he had, he could not have registered it, as it would have been a piracy: *D'Almaine* v. *Boosey*. (2) It was there decided that to publish in the form of quadrilles and waltzes the airs of an opera, of which there is an existing copyright, is an act of piracy. And Lord Abinger, C.B., delivering the judgment of the Court, says: "The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment." The reasoning of the Court in that case is applicable to the present, and is conclusive of it. Brissler was not the author of the pianoforte score within the meaning of the copyright acts,

(1) 7 C. B. (N.S.) 268; 29 L. J. (C.P.) 20. (2) 1 Y. & C. Ex. 288, 302.

6 Jur. N.S. 226.

which mean by author the designer, creator, or inventor of a work; Brissler has merely adapted the melodies, which are the very essence of an opera, to a particular instrument. Lord Abinger says (1), and there can be no doubt, that a bonâ fide abridgment of a work, or a digest, being in its nature original, may be the subject of a copyright; but Brissler's work is not an abridgment in any sense.

J. D. Coleridge, Q.C. (*Blaine* with him), for the defendants, was not called upon.

KELLY, C.B. I cannot but express my regret that we feel it our duty to affirm the judgment of the Court of Queen's Bench, for I have not any doubt that Brissler, who is the real author of this arrangement of the opera originally composed by Nicolai, was employed and paid to adapt the music to the pianoforte by Bote and Bock, who were the representatives of Nicolai, and under whom the plaintiff claims. The merits of the case are therefore with the plaintiff. He is the proprietor of the work, but unfortunately he has not registered it properly, either in the description of the work itself, which is stated to be "Die Lustigen Weiber von Windsor, Komische Oper, Pianoforte Score," or in the name of the author, who is stated to be Otto Nicolai, of Berlin, who in fact was dead about two years before the pianoforte score was brought into existence.

The case is simple enough. Nicolai was the author of an opera, "Die Lustigen Weiber von Windsor," which was represented and probably published in March of the year 1849: he is said to have died two months after that period. Nearly two years afterwards, his representatives Bote and Bock, who had become the proprietors of the opera, employed Brissler, and no doubt paid him, to adapt the opera to the pianoforte, and he has accordingly become the author of the work in question, which is an adaptation of the music of the whole of the opera,—of the original score, prepared for some twenty instruments,—to the pianoforte alone.

The question then is, can this action be maintained? That depends on whether the plaintiff, who claims as the assignee of Bote and Bock, has complied with the provisions of s. 6 of the

(1) 2 Y. & C. Ex. 288, 301.

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International Copyright Act (7 Vict. c. 12), which requires the following particulars to be registered at the time of making the entry:—The title of the book; the name and place of abode of the proprietor of the copyright; the time and place of the first publication. On looking at a copy of the entry, we find under the heading "title of book"—and here a point arises—"Die Lustigen Weiber von Windsor, Komische Oper, composed by Otto Nicolai. Pianoforte score." If that means the opera itself, the entire opera that is, it is not for an infringement of the copyright of the opera itself that the action is brought. If it means the pianoforte score or arrangement for the pianoforte of the opera called "Die Lustigen Weiber von Windsor," it may be said to be correctly described. We have now to consider the third column on which the question arises, namely, the place of abode of the author or composer, and I do not understand my Brother Parry to dispute that it is necessary, in order to comply with the terms of this statute, that the name and place of abode of the author of the work, which is to be registered and in respect of which the copyright is to be secured by the registration, are to be inserted in this column; but the question is, whether the statute is properly complied with, when we find that the name of author or composer of the work and his place of abode are registered as Otto Nicolai (he having died two years before), with his place of abode as Berlin, and not Brissler, who really made the arrangement. The question in this case is, whether this arrangement and the opera as originally composed is really one and the same work; not as my Brother Parry has argued, whether the arrangement is a piracy of the original work, or would be a piracy of the work if published without the authority of the representatives of Nicolai. Now, in reference to the case that was decided in the Court of Exchequer, *D'Almaine* v. *Boosey* (1) I have no hesitation in saying that if Brissler had published this arrangement for the pianoforte during Nicolai's lifetime without his authority, or since his death without the authority of Bote and Bock, his representatives, he would have pirated the work; or if there had been a copyright act in force in Berlin, such as there is in this country, no doubt Nicolai or his

(1) 1 Y. & C. Ex. 288.

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representatives might have maintained an action for the infringement of the copyright against Brissler. But although the work of Brissler, if published without the authority of the composer of the original opera or his representatives, would be the piracy of that work, yet it may be a new and substantive work in itself, and be the subject of a copyright at Berlin, probably according to the law of Prussia, certainly in this country under the copyright acts in force. Let us see, in order to understand the question, what the nature of Brissler's work is. My Brother Parry has argued that the arrangement and the original score are one and the same thing; that the melody, the very essence of the music to be found in the opera, pervades the whole of this work of Brissler, and the only difference between the one and the other is that the one is an opera, and the other is only an adaptation of that opera to the pianoforte; but it is only necessary to look at and consider the case for a moment to see that the two works are substantially different. The opera is composed and is published in score, and contains in each line of what is called the entire score, the music for some one particular instrument, these instruments being some twenty in number. Now let us come to what the arrangement is for the pianoforte. Undoubtedly there are portions of it which are identical, as in the case before the Exchequer, and might subject, as I have already observed, the author of the adaptation to an action if it had been published without the authority of the author of the opera. But what is the pianoforte arrangement? It is an arrangement of the whole of the music of this opera for the pianoforte, a part of which is the ordinary pianoforte accompaniment, the bass and the treble played with both hands, and which is independent of the melody. There may be, as it appears, the line of music for one voice, or two or three voices, as the case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and, no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes forming which are nowhere to be found in the score at all. The accompaniment for the pianoforte is a work of greater or less skill. In

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some cases, perhaps in many cases—it may be in this for aught I know—the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience, might have been able to do without difficulty; but it may be, and often is, as in the case of the six operas of Mozart's, by Mazzinghi, a work—I would hardly use the term of great genius, but a work—of great merit and skill of that eminent composer and pianist, Mazzinghi. If such a work be published as the adaptation to the pianoforte by a composer other than the composer of the original opera, no doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the adaptation; but whenever the copyright in the original opera has expired, if after that, and for the first time, another composer composes another adaptation of that opera to the pianoforte, it is a new substantive work, in respect of which he is just as much entitled to the benefit of the copyright in this country as the original composer of the opera; and if any one had, by an adaptation pirated that arrangement, he would be liable to an action for that piracy. I consider that an infallible test to shew the difference between the one work and the other—between the original opera and the arrangement of it for the pianoforte. It is perfectly clear, therefore, that in point of fact—for it is rather a matter of fact than anything else—the adaptation to the pianoforte, or the arrangement for the pianoforte, of an opera already published, is itself a new and separate work, and is not one and the same with the original opera. What, then, is the result as applied to the present case? Why, that in order to comply with this section of the act, and so entitle the plaintiff to the benefit of the copyright, the name of Brissler ought to have been inserted as the author and composer instead of Otto Nicolai. I repeat the whole of this case resolves itself into the simple question, not whether this arrangement for the pianoforte is a piracy of the original opera, if published without the licence or consent of the author of the opera, but whether it is one and the same work, so that Nicolai, though dead and buried, was the author of it. I think it is perfectly clear that the opera is one work, and that Nicolai was the author; the arrangement for the pianoforte is another work, of which Brissler is the author, and Brissler's name

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ought to have been introduced as the author, in order to comply with the act of parliament under which this action is brought.

BRAMWELL, B. I am also of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. It ought to be distinctly understood that the plaintiff is not suing as the assignee of the copyright of the original opera. That cannot be claimed, because, as I understand, it was not registered within a year after its first publication. If the plaintiff has any title at all, it is under the register of the 4th of October, 1851, which is not a registration of the opera of Nicolai's composition, but a registration of what is there called "the pianoforte score," which might more accurately have been called an arrangement of the opera for the voices, with a pianoforte instead of an orchestral accompaniment. Then the question is whether the name of the author of that work is accurately stated, and if it had been called an arrangement for the voices with the pianoforte accompaniment, it would have been manifest that Otto Nicolai was not the author of the arrangement nor of the pianoforte score. The truth is, an opera is originally written for the voice and for different instruments. In this pianoforte score, as it is called, the parts written for the voice are identically preserved, and there can be no doubt that if a man had a copyright in the original opera, such a score would be an infringement of his copyright. But when we come to the part, not for the voices, but for the pianoforte, which is not an identical repetition of what the author wrote, it is the business of the adapter, the person who arranges it for the pianoforte, to preserve the harmony and, as far as he can, the notes and all the effects of the original composer, but he cannot produce upon the pianoforte everything that the author wrote, as he wrote it. Anybody who knows anything of the orchestral score and of the pianoforte arrangement, would know that. It is a physical impossibility that fingers could play upon the pianoforte every note as it is written in the orchestral score. For example, where there is a tremolando in the music—that is when the violins play the same notes backwards and forwards continually, of course that cannot be done on the piano, and sometimes for a substitute an octave is played with the thumb and finger. To arrange this to the best advantage great judgment and

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considerable power of choice is required on the part of the arranger. Frequently there are other differences; there are prolonged notes in the one and not in the other; as the score of the opera is written for several instruments which cannot all be represented on the piano, the arranger puts in an octave below on the piano to give as far as possible the same effect. Many other changes must of necessity be made. It is quite clear, therefore, that what the person who arranges for the pianoforte does is something different from what the original composer has done. Anybody who plays any musical instrument knows it is a very common expression to say, such a piece is very well arranged, such a piece is very ill arranged; this is a very difficult arrangement; that is an easy arrangement. Those who play the German arrangements know they are more difficult than the English, because the German, with great conscientiousness, endeavours to put into the arrangement every note that the composer has put into the score as far as he can; whereas the English composer endeavours in all arrangements to make them clear for the player, and an English arrangement is by no means so laborious as the German. It is manifest, therefore, that there is some judgment and taste required on the part of the arranger for the pianoforte; and it is also certain that if it should so happen that a man should compose an opera without being able to play on the pianoforte—which is, I believe, a perfectly possible thing—he could not arrange it himself for the pianoforte. The person who arranges for the pianoforte must have a knowledge of the instrument; it would be a bad arrangement if he put in passages that do not lie well for the hands, as it is called, so as to give a facility of playing. I repeat, therefore, that if, instead of this music being called a "pianoforte score," it had been called "an arrangement for the pianoforte and voices," it would have been manifest that the name of the author of that was not Otto Nicolai but Brissler, who made this arrangement; and it might be a prudent thing, for aught I know, to state that the author of the opera was Otto Nicolai, and the arranger or the adapter was Brissler. It has been said that there is nothing inventive on the part of the person who makes the arrangement. In one sense there is not, that is to say, he neither invents the tune nor the harmony; but there is invention in another sense, or

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rather there is composition in the adaptation to the particular instrument. Of that the adapter is the author, and it is perfectly certain that the man who wanted to arrange this opera for a pianoforte, would find it a great deal easier to copy what Brissler had done than to take the score and do it over again. If he took the original score, there would probably be many differences between him and Brissler, and very likely, if Brissler arranged it over again, he would do it differently, because there is no rule by which a man is bound to do it in a particular way. It is clear, therefore, that there is something in the nature of authorship in Brissler, and his name not having been stated as the author in the register, it seems to me manifest the plaintiff has not a copyright of the pianoforte score, as it is called, and consequently cannot complain of this infringement.

WILLES, KEATING, and MONTAGUE SMITH, JJ., and CHANNELL, B., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Pike & Son.*
Attorney for defendants: *R. Comyn.*

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Feb. 12.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of Arrangement and Distribution—Priority of Payment—Inequality.*

By a deed of January, 1867, for the arrangement and distribution of a debtor's estate, after reciting that by a deed of December, 1865, the debtor's creditors had granted him a letter of licence to carry on his business of a colliery proprietor under the direction of inspectors, and that the inspectors might retain or require payment out of the estate of all costs, charges, and expenses, in anywise relating thereto, and might raise any sum of money by way of mortgage of the colliery, and apply the money (amongst other things) in paying the costs, charges, and expenses incurred in carrying on the business, and in raising the money, the debtor assigned his estate to a trustee to get in and realize the same, and after payment of the costs of the arrangement of 1865 and all costs, charges, and expenses thereinbefore recited or referred to as having been incurred by the inspectors, or with their sanction for the benefit of the debtor's estate, to pay the residue rateably amongst the debtor's creditors:—

Held, that the provision for the payment of the costs incidental to carrying on the business and all expenses incurred under the deed of 1865, in priority to the

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debts of the other creditors, did not render the deed of 1867 invalid: for that either the inspectors had a lien for their expenses, &c., under the deed of 1865, or there might be a very reasonable doubt in the matter, and in the latter case the majority of the creditors might well consider it best for the general body of creditors not to litigate the matter, but to provide for paying the inspectors their expenses in priority to the other creditors.

affd by Ex Ch. post 446

FIRST, second, fourth, and fifth counts, by the plaintiff as indorsee against the defendant as drawer of four several bills of exchange; third and sixth counts by the plaintiff as drawer against the defendant as acceptor of two several bills of exchange.

Plea, that by a deed bearing date the 14th of January, 1867, made between the defendant of the first part, one J. Bewley, a trustee on behalf of the creditors of the defendant of the second part, and the several persons who were creditors of the defendant of the third part, relating to the debts and liabilities of the defendant and his release therefrom, and the management and distribution of his estate, the defendant assigned to J. Bewley all his real and personal estate upon the trusts and purposes in the deed mentioned, and the creditors of the defendant released the defendant from all his debts, claims, and demands: the plea then averred the performance of all conditions required by s. 192 of the Bankruptcy Act, 1861, so as to render the deed as binding on the plaintiff as if he had been a party to it.

The replication set out the deed of the 14th of January, 1867, which was between the parties named in the plea, and after reciting certain clauses of an indenture of the 2nd of December, 1865, made between the defendant of the first part, the creditors of the defendant of the second part, and certain inspectors of the third part [which deed is set out in full in the replication], proceeded:—

"And whereas the indenture of the 2nd of December, 1865, was executed by a majority in number representing three-fourths in value of the creditors of the defendant, and was duly registered under s. 193 of the Bankruptcy Act, 1861; and whereas since the date of the recited deed various meetings of the creditors have taken place, and divers attempts have been made by the inspectors and by the defendant, with the sanction of the inspectors, to sell the colliery, and to raise money on the security of the same, all which attempts proved abortive in consequence of the lessee of

the mines refusing to consent to an assignment of the same, although he was made aware that a large price had been offered. And whereas various expenses were incurred with the sanction of the inspectors in carrying out the trusts and provisions of the indenture, and also in defending certain proceedings established by the lessor of the collieries to recover possession of the same, and in advising with counsel as to the rights of the lessor, and the expediency of applying to Chancery for relief, and in defending certain actions brought by creditors of the defendant after the deed had been registered, and in working the collieries by the inspectors; and whereas the London Joint Stock Discount Company issued an execution against the defendant, under which the sheriff seized; and whereas the inspectors agreed to pay the costs of the Discount Company and the costs of the sheriff, in consideration of the execution being withdrawn, as a levying of the execution by the sheriff would have caused the forfeiture of the collieries; and whereas the costs were advanced accordingly, and have not yet been repaid to the person advancing them; and whereas the costs, charges, and expenses hereinbefore recited to have been incurred by the inspectors, or with their sanction, were incurred for the benefit of the estate; and whereas at a meeting of the creditors of the defendant it was resolved that his estate and effects should be assigned to a trustee to be appointed and administered for the benefit of the creditors, and that in consideration of such assignment the defendant should be released from his debts, and his estate wound up under a deed of arrangement." The defendant, by the deed of the 14th of January, 1867, then assigned the whole of his estate to J. Bewley, upon trust, to sell and convert the same into money, and "upon trust thereout, after payment of the costs of the arrangement of 1865, and of the registered deed, and all costs, charges, and expenses hereinbefore recited or referred to as having been incurred by the inspectors, or with their sanction, for the benefit of the defendant's estate, and the costs of and incident to these presents and the registration of the same, and incident to the arranging terms of compromise with the lessor of the collieries, and also the usual costs, charges, and disbursements of J. Bewley and his clerks," to pay the residue rateably to all the defendant's creditors. The deed of the 14th of January, 1867, contained a

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release by the creditors, and other provisions, which it is unnecessary to refer to.

The replication then set out the deed of the 2nd of December, 1865, between the defendant, described as coal proprietor, of the first part; the creditors of the defendant, of the second part; and the three inspectors, of the third part. "Whereas, by two indentures, dated the 13th of June, 1863, between the Right Honourable Edward Cardwell, of the one part, and the defendant, of the other part, certain mines and hereditaments were demised by Cardwell unto the defendant, his executors, administrators, and limited assigns during a term of sixty years from the 1st of January, 1863, at the rent and subject to the covenants and conditions therein reserved and contained respectively. And it was by the said indentures provided, that in case the lessee should become bankrupt or compound his debts, or assign his estate for the benefit of his creditors, or if process should issue against him, whereby any part of the said mines should be taken in execution, and the amount for which such mines should be taken in execution should not be paid within twenty-eight days after seizure thereof, it should be lawful for the lessor to re-enter into the demised mines and premises, and immediately thereupon the lease should determine; and by the same indentures the lessee covenanted with the lessor, his heirs and assigns, that the lessee, his executors, administrators, or assigns, would not at any time during the term (save and except for the purpose of admitting a partner or partners to be jointly interested with him or them, or for the purpose of a security or securities for the loan of any sum of money for the use of the colliery), sell, let, assign over, or otherwise part with the possession of the mines and premises, or any part thereof, without the licence or consent in writing of the lessor, &c. And whereas the defendant, under the style or firm of the Coppull Hall Coal and Cannel Company, has during the last two years been engaged in opening up the mines of coal comprised in the said indenture, and in the course of his operations has become indebted to the parties hereto of the second part in divers sums of money which he is unable to pay in full at the present time, but expects to be able to do so in the course of three calendar months. And whereas, at a meeting of the said creditors held on the 13th day of November,

1865, it was resolved that the colliery of the defendant should be carried on by him for three months under the inspection of the said inspectors, and that power should be given to the inspectors, if necessary, and so far as could lawfully be done, to raise funds for the purpose of carrying on the colliery. Now this indenture witnesseth, that in consideration of the premises the parties hereto of the second part do hereby grant unto the defendant during three months from the date of his execution of these presents licence to carry on his trade or business of a coal proprietor, and to work the said mines or colliery, and to sell the coals and minerals thereby produced, under the direction, inspection, and control of the inspectors; and hereby agree with the defendant, that if any of the creditors respectively shall, during the continuance of the licence, either in law, equity, bankruptcy, or otherwise, arrest, imprison, sue, or proceed against the defendant, his heirs, &c., or his estate or effects, for or on account of any debt or demand from or upon the defendant, these presents may be pleaded in bar to all actions, suits, and proceedings in respect thereof, with the same effect as an order of discharge under an adjudication of bankruptcy, in case the defendant had been made a bankrupt. Provided always, that in case there shall be any wilful violation of the directions of the inspectors, in breach of the covenants herein contained, on the part of the defendant, it shall be lawful for the inspectors, or the survivors or survivor of them, in writing to revoke the licence, and in such case, immediately after such revocation, the licence shall absolutely cease. And the defendant, for himself, his heirs, &c., hereby covenants with the inspectors, that he will, when required by the inspectors, render to them an account of the colliery, and keep all books of account open to their inspection, and upon the request and direction and under the inspection and control of the inspectors, or the survivors or survivor of them, to the best of his skill and ability, will manage and carry on the said trade or business of a coal proprietor, and work the colliery and sell the coals and minerals obtained by such working, and will not by proceedings in bankruptcy, or otherwise, during the next three months, withdraw himself or his estate from the engagements in these presents contained, nor without the approval of the inspectors will release or prejudice any debt or claim, and will from time to

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time pay and deliver to the said inspectors or inspector the moneys and securities which shall be produced from his estate when the same shall be received; and will execute and do all such assurances and things as in the judgment of the inspectors shall be necessary for the purpose of raising money upon the security of the colliery for the purpose of carrying on and working the colliery, and will divide the money to arise from the sale of the coal and the money to be raised by the inspectors in the way herein indicated rateably among his creditors. And this indenture also witnesseth that in consideration of the premises all the parties hereto for themselves and their respective partners do hereby covenant and agree:—1. That the estate of the defendant shall be administered as in bankruptcy. 2. That the defendant shall carry on the business of the colliery under the joint direction of the inspectors; but the inspectors shall not give any direction or interfere in the business unless they are unanimous in such direction or interference. 3. That the inspectors may employ and discharge any solicitors, agents, miners, workmen, clerks, and other persons they may consider necessary for administration of the estate, and at such remuneration or wages as the inspectors may think proper. 4. The inspectors may bring, prosecute, or discontinue or compromise any action, suit, or other proceedings concerning the estate; and may retain or require payment out of the estate of all costs, charges, and expenses in anywise relating thereto; and the inspectors may give to the defendant any remuneration they may consider him entitled to for his services in working the said estate. 5. That the inspectors may sell the coal produced from the colliery, and give time for payment by instalments or otherwise, and either with or without security. 6. That it shall be lawful for the inspectors to raise any sum by way of mortgage of the same. 7. That all money obtained by the inspectors from the working of the colliery, or by way of mortgage, shall be applied in the first place in the payment of the costs of these presents, and all costs incidental to the arrangement with the creditors, and to the preparation, execution, and registration of these presents, and of and incidental to the carrying out the trusts and provisions of these presents, including the costs, charges, and expenses, and for loss of time incurred in the carrying on of

the said business, and in raising money as aforesaid, and in the second place in paying to the defendant such remuneration as the inspectors may think fit for his services in carrying on the said business and realizing the coals, and in the third place in paying rateably all the creditors the respective amounts owing to them by the defendant without preference or priority at such time or times, and in such manner as the inspectors shall determine, and the surplus, if any, shall be paid over to the defendant. 8. That nothing herein contained shall prejudice or affect the rights or remedies of the creditors against any person other than the defendant. 9. That in case the money to be raised or obtained by the inspectors from the working of the mines, or by way of mortgage, shall be insufficient to defray the costs, charges, and expenses incurred in the discharge of the trusts of these presents, the deficiency shall be borne by such of the creditors as shall accept these presents rateably, in proportion to the amounts of their respective debts. And the defendant hereby gives power to the inspectors or the survivors or survivor of them, in the name of the defendant, to sue for, recover, receive, and give valid receipts for all debts due and owing to him. And it is hereby declared by all parties to these presents, that the inspectors or any of them may compound for such debts or debt, or accept security for the payment, or give time for such payment, or refer the said debts to arbitration. And it is hereby declared that it is intended that this deed shall be registered under the 193rd section of the Bankruptcy Act, 1861. Provided always, that if at the end of three months from the execution of these presents, any of the said creditors shall not be paid twenty shillings in the pound, then, subject to any mortgage which may have been made by virtue hereof, the position of the unpaid creditors shall not in any way be prejudiced or affected by executing these presents."

The replication then averred that the deed of the 14th of January, 1867, was executed by the defendant more than three months after the date of the execution by the defendant of the deed of the 2nd of December, 1865, and that divers of the costs, charges, and expenses, in the deed of the 14th of January, 1867, recited to have been incurred, were incurred, and the advances and payments therein recited to have been made, were made,

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after the expiration of three months after the date of the execution by the defendant of the deed of the 2nd of December, 1865, and the same respectively were unpaid at the time of the execution by the defendant of the deed of the 14th of January, 1867.

Demurrer and joinder.

Quain, Q.C. (*A. Peel* with him), in support of the demurrer. It will be contended that the deed of January, 1867, is invalid, as it provides for the payment in full of the costs of the former deed, and the expenses of carrying on the colliery under inspection. But this preference does not invalidate the deed. *Re Tresidder* (1) is in point. It was decided in that case that a deed which provides for the payment of costs of a former deed is not invalid. The expenses that were incurred in carrying on the colliery were incurred for the benefit of the general body of creditors and for the preservation of the estate, and the two deeds must be treated as one transaction. In *Spitzer* v. *Chaffers* (2) the deed contained a clause that the trustees should pay all costs, charges, and expenses which they had paid, sustained, or been put to, and the deed was held good. There was a similar clause in the deed in *Strick* v. *De Mattos* (3), and that deed also was held valid. Under the first deed the inspectors have a lien on all moneys which come into their hands; the costs, charges, and expenses are a charge on the estate; and the inspectors might have declined to acquiesce in the second deed unless those charges were first paid. It was only reasonable, therefore, that the creditors should provide in the second deed for the payment of those expenses in priority to the other debts. The modern decisions shew that the courts will not interfere with the discretion of the majority of the creditors in managing their debtor's estate, provided the deed be a bonâ fide deed.

Dixon, contrà. No case has decided that the costs of an abortive deed and the expenses incurred in carrying on the debtor's business shall be paid in full to the prejudice of other creditors. *Re*

(1) Law Rep. 1 Ch. App. 21.
(2) 33 L. J. (C.P.) 7; 14 C. B. (N.S.) 686. 10 Jur N.S. 250
(3) 33 L. J. (Ex.) 276; 3 H. & C. 22. 10 Jur NS 752.

Tresidder (1) is no authority for the defendant; the first deed there was only preliminary to the second, and the two were parts of the same transaction. It is settled law that one class of creditors are not to be preferred to another, and that an unequal distribution of the property of a debtor amongst his creditors vitiates a deed against non-assenting creditors. Under the first deed in this case the inspectors had no lien; and if they had, it applied only to expenses incurred within the three months during which they were allowed to carry on the colliery. At the expiration of three months from the execution of the first deed, that deed came to an end, as the licence to trade was limited to three months. Besides, the whole of the expenses were not incurred by the inspectors; the deed set out in the replication states that the costs of paying out the sheriff were advanced, and have not yet been repaid to the person advancing them; but it does not state that they were advanced to the inspectors. The person advancing the money could have no lien on the estate, and the payment to him in full of his debt would be sufficient to invalidate the deed.

Quain, Q.C., in reply.

BLACKBURN, J. I think there is no valid objection to this deed. The replication sets out the two deeds, one made in December, 1865, and the other in January, 1867. By the first deed an arrangement is made between the defendant's creditors, that the defendant shall be allowed to carry on his colliery for three months under inspectorship, and therefore the deed provides that the creditors, on their part, do grant to the defendant, during three months from the date of the deed, licence to carry on his trade or business of a coal proprietor, and to work the mines or colliery, and to sell the coals or minerals under the direction of the inspectors; and the defendant, on his part, covenants with the inspectors that he will, to the best of his skill and ability, manage and carry on the said trade and work the colliery for the next three months, and execute all such assurances and things as in the judgment of the inspectors shall be necessary for the purpose of raising money upon the security of the colliery, for the purpose of carrying on and working the same. The effect of this is, that the creditors bind themselves

(1) Law Rep. 1 Ch. App. 21.

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that the colliery shall be carried on under inspectorship for three months, and the defendant binds himself to carry it on for that period; but there is nothing in the deed which says, that when the three months come to an end, the business shall be stopped. If the creditors please, they can stop it at the expiration of that time; and if all the parties please, it may still be carried on. The business was, in fact, carried on under the inspectorship deed beyond the three months, and certain costs and charges were incurred in carrying it on after that period. The deed of 1865 then provides for the payment of the costs of the deed, "and all costs incidental to the arrangement with the creditors, and to the preparation, examination, and registration of that deed, and of and incidental to the carrying out of the trusts and provisions thereof, including the costs, charges, and expenses, and loss of time incurred in carrying on the business and in raising money;" and there is a clause that the inspectors may retain or require payment out of the estate of all these costs. These expenses would be charges on the property; it seems to me that if they were incurred in carrying out the trusts of the deed, that would make them an equitable charge binding on the estate, which would give the inspectors a lien on the estate. It is not necessary to decide this, but if it were, I should be of that opinion; it is evident from the recital of these clauses, that the creditors thought there was a lien, and that is sufficient. Then comes the deed the validity of which is in question, the deed of January, 1867, and it is impugned on the ground that the payment of the costs of the arrangement of 1865, and all costs and expenses incurred by the inspectors under that deed, is a preference which vitiates the deed. There is a plausible ground for saying that the inspectors had an equitable lien on the property for the costs incurred by them. If so, it is plain that there can be no objection to the deed. But if the inspectors had no lien, then it is equally plain that the payment of these costs in the manner provided by the deed would be beyond the scope of their power. But there is an intermediate alternative, and it is, that the inspectors may have thought that they had a lien which they might enforce in equity; this might be doubtful, but the creditors as rational persons might agree amongst themselves not to litigate the matter, thinking it better for the interest of the

general body of the creditors not to run the risk of a chancery suit, but to settle the matter amicably. The question relates to the winding-up of their debtor's estate, and the legislature having given the majority of the creditors authority to bind the minority, I think the majority have power to say a doubtful matter shall be settled without litigation. I therefore think the objections taken to the deed cannot prevail.

LUSH, J. I am of opinion that the provision for making the costs and expenses incurred under the deed of 1865 a first charge, does not invalidate the deed of 1867, because, by the terms of the earlier deed, either an equitable lien was created with respect to those charges, or at all events, I think that the words of the deed are sufficient to give the inspectors a plausible ground for believing that they had a lien on the estate for the charges incurred during the carrying on of the colliery. It is contended that the deed of 1867 is bad for two reasons; first, because the powers of the inspectors under the first deed came to an end at the expiration of three months; and secondly, because the costs and charges of carrying on the colliery were incurred after the three months had expired. The deed binds all parties to carry on the colliery for three months: after that time their hands were free, and they stood with relation to one another as they were before; that, however, by no means limits the capacity of the parties to going on for three months. I do not find any provision that puts an end to the deed at the expiration of three months. The colliery was carried on after that time under the deed with a view of realizing the assets. It is, I think, perfectly competent for the creditors to determine that the inspectors shall be indemnified out of the estate. It does not appear that all the charges were incurred on the responsibility of the inspectors; it appears that a part of them, in respect of paying out the sheriff, was paid by some third person: that only removes the equity one step further. It is quite clear that it was the intention of all parties that the inspectors should be indemnified out of the corpus of the estate. I think that the claim of the inspectors is so fair, and their right to a lien on the estate so plausible, that the creditors were justified in coming to the conclusion that the question should not be litigated, but that

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an arrangement should be made to pay the expenses in full. Our judgment will be for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Hurford & Taylor.*
Attorneys for defendant: *Field, Roscoe, & Co.*

Feb. 12.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF REIGATE *v.* HART.

Penalties, application of—Payment to Treasurer of County or Borough, under 11 & 12 Vict. c. 43, s. 31.

By 11 & 12 Vict. c. 43, s. 31, when persons are convicted by justices under statutes which contain no directions for the payment of the penalties to any person, the penalties are to be paid to the clerk of the division for which the justices usually act, and he is to pay them over to the treasurer of the county, riding, ... city, borough, or place, for which such justices shall have acted; and a return is to be made by the clerk to the clerk of the peace for the county, borough, &c., in which the division is situate, when and as the court of quarter sessions for the same shall order.

The municipal borough of R., in the county of S., has no separate commission of the peace, and no court of quarter sessions. The mayor and ex-mayor of R. have jurisdiction in R. as justices, and the justices of the county at large have concurrent jurisdiction. There is a treasurer for the borough:—

Held, that the justices in and for the borough acted as county justices, with their powers limited to a particular locality; and the word "borough" in the above section meant a borough which has a court of quarter sessions; and therefore that penalties imposed by justices acting in and for the borough were to be paid to the treasurer of the county, and not to the treasurer of the borough.

CASE stated without pleadings.

The action was brought to recover penalties received by the defendant, which the plaintiffs contend ought to be paid over to their borough fund.

By Royal Charter, dated the 11th of September, 1863, the parliamentary borough of Reigate, in the county of Surrey, was constituted a municipal borough, with a corporation, under the title of "The Mayor, Aldermen, and Burgesses of the Borough of Reigate," having all the powers and privileges held and enforced by the several boroughs named in the schedules to the 5 & 6 Wm. 4, c. 76, as fully and effectually as if the borough of Reigate

had been one of the boroughs named in the first section of schedule B., and her Majesty did thereby extend to all the inhabitants of the borough of Reigate all the powers and provisions of the statute, and of any other acts amending or altering the act, or in anywise relating thereto.

The borough of Reigate, before the 11th of September, 1863, formed part of the Reigate petty sessional division of the county of Surrey. There is no separate commission of the peace for the borough under s. 98 of 5 & 6 Wm. 4, c. 76, and there has been no grant of a separate court of quarter sessions of the peace to the borough. The justices of the peace for the county have since that date, by virtue of s. 111 of the statute, exercised the jurisdiction of justices of the peace in and for the borough, and acted concurrently with the mayor for the time being, who, by s. 57 of the statute, is, ex-officio, a justice of the peace in and for the borough, and so continues during the year next succeeding his year of office.

The defendant, previous to the 11th of September, 1863, had been and still is clerk to the county justices acting out of quarter sessions in and for the petty sessional division of Reigate, and since the incorporation of the borough he has acted as clerk to such justices both when acting as justices for the county out of sessions, and when acting as justices in and for the borough.

By 11 & 12 Vict. c. 43, s. 31, "In every warrant of distress to be issued thereunder the constable or other person to whom the same shall be directed shall be thereby ordered to pay the amount of the sum to be levied thereunder unto the clerk of the division in which the justice or justices issuing such warrant shall usually act; and if any person convicted in any penalty, or ordered by a justice or justices of the peace to pay any sum of money, shall pay the same to any constable or other person, such constable or other person shall forthwith pay the same to such clerk; and if any person committed to prison upon any conviction, or order for non-payment of any penalty, or of any sum thereby ordered to be paid, shall desire to pay the same and costs before the expiration of the time for which he shall be so ordered to be imprisoned by the warrant for his commitment, he shall pay the same to the gaoler or

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keeper of the prison in which he shall be imprisoned, and such gaoler or keeper shall forthwith pay the same to the clerk, and all sums so received by the clerk shall forthwith be paid by him to the party or parties to whom the same respectively are to be paid according to the direction of the statute on which the information or complaint in that behalf shall have been framed; and if such statute shall contain no such directions for the payment thereof to any person or persons, then such clerk shall pay the same to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice or justices shall have acted, and for which such treasurer shall give him a receipt without stamp, and every such clerk, and every such gaoler or keeper of a prison, shall keep a true and exact account of all such moneys received by him, of whom and when received, and to whom and when paid, in the form (T) in the schedule to this act annexed, or to the like effect, and shall once in every month render a fair copy of every such account unto the justices who shall be assembled at the petty sessions for the division in which such justice or justices aforesaid shall usually act, to be holden on or next after the first day of every month, under the penalty of 40*s.*, to be recovered by distress in manner aforesaid, and the clerk shall send or deliver every return so made by him as aforesaid to the clerk of the peace for the county, riding, division, liberty, city, borough, or place within which such division shall be situate at such times as the court of quarter sessions for the same shall order in that behalf."

From the time of the incorporation of the borough hitherto there has always been a treasurer of and for the borough.

The defendant has, since the incorporation of the borough, received divers sums of money amounting to the sum of 48*l.* 12*s.* 6*d.*, ordered to be paid by the justices of the peace acting in and for the borough for fines and penalties and otherwise for offences committed against certain statutes, which statutes contain no directions for the payment of such moneys to any particular person or persons; and such moneys have from time to time been paid over by the defendant to the treasurer of the county of Surrey, to whom the defendant contends that they are payable.

The question for the Court was, whether the sums of money

received by the defendant should have been paid by him to the treasurer of the borough or to the treasurer of the county.

Macnamara, for the plaintiffs. By s. 31 of 11 & 12 Vict. c. 43, it is provided that when persons convicted in penalties under statutes which contain no direction as to their application, the penalties shall be paid to the treasurer of the county, division, or borough for which the justices acted: and the question under that section is, how are the penalties to be applied in this case? Are they to be paid to the treasurer of the county or of the borough? The penalties have been ordered to be paid by the justices acting in and for the borough, and therefore ought to be paid over to the borough treasurer. The mayor and the ex-mayor are ex officio justices of the borough, and could only act as justices of the borough. The penalties, therefore, ought to go to the borough. The difficulty is created by the concluding words of the section, "that the clerk shall send every return so made by him as aforesaid to the clerk of the peace for the county, riding, division, liberty, city, borough, or place within which such division shall be situate at such times as the court of quarter sessions for the same shall order."

[BLACKBURN, J. Those words seem to shew that the legislature only contemplated boroughs which had separate courts of quarter sessions.]

Archibald (*Mellish, Q.C.*, with him), for the defendant. Where the charter contains no non-intromittant clause, the county justices have concurrent jurisdiction in the borough with the borough justices, and the justices acting in and for the borough act as county justices. This is decided in *Rex* v. *Amos* (1); with the exception that the borough of Liverpool had a court of quarter sessions, that case is in all respects like the present. *Reg.* v. *Dale* (2), decided under the 9 Geo. 4, c. 61, is an authority to shew that the word "borough," as used in s. 31 of 11 & 12 Vict. c. 43, means a borough for which a court of quarter sessions is held. If the penalties are paid to the borough fund, and not to the treasurer of the county, the borough would receive a double benefit; its fund would be augmented by the amount of the penalties, and its prisoners would be prosecuted

(1) 2 B. & A. 533. (2) 22 L. J. (M.C.) 44.

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at the expense of the county. Here the justices acted as county justices, and as the borough has no court of quarter sessions the penalties ought to be paid to the treasurer of the county.

Macnamara, in reply.

BLACKBURN, J. I think the case is clear. In *Rex* v. *Amos* (1), the justices of the borough of Liverpool had no exclusive jurisdiction within the borough, and they had no jurisdiction beyond the borough, and the point raised was whether, when a borough justice has committed a prisoner to the county house of correction for a felony committed within the borough, the borough sessions can order him before them for trial. The Court held that they might. The reason given for this (2) is, that "they [the offenders] are county offenders, and if not tried at the borough sessions must, at probably a heavy expense to the county, be tried at the county sessions. The borough justices, therefore, and the borough sessions, as far as they act upon what are at the same time borough and county offences, and borough and county offenders, act in ease and aid of the county justices and county sessions, and discharge that duty which must otherwise be discharged by the county magistrates. To a certain extent, therefore, they are for that part of the county to which their power extends county magistrates,"—and then (3) after stating that justices of liberties could commit to county houses of correction to which those liberties contributed, the judgment proceeds: "Upon what principle could that be but upon this, that to this extent and with reference to county offenders within their limits, they were in the nature of and had the powers of county justices; and if this were their character, they must be considered as county justices for all purposes connected with the subject, and not for the purpose of commitment only." These two passages are ample authority for our holding that in a borough where there is no court of quarter sessions and no non-intromittant clause in the charter, and all acts that the borough justices do can be done by the county justices, the borough justices must be considered as county justices, with their powers limited to a special locality.

(1) 2 B. & A. 533. (2) 2 B. & A. at p. 542.
(3) 2 B. & A. at p. 544.

Now that we have established that the borough justices are to be considered as county justices, what does s. 31 of 11 & 12 Vict. c. 43, enact? "That if any person convicted in any penalty pay it to any constable the constable shall pay it to the clerk of the division, and all sums received by the clerk shall be paid by him to the party to whom the same respectively are to be paid according to the directions of the statute on which the information shall have been framed; and if such statute shall contain no such directions for the payment thereof to any person, then such clerk shall pay the same to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice shall have acted." Stopping there, does the Mayor of Reigate act for the borough or the county; adopting the reasoning in *Rex* v. *Amos* (1), he acts for the county. The section then provides that the clerks shall keep accounts of all moneys received, and render a copy to the justices at the petty sessions for the division in which they act, and then proceeds: "The said clerk shall send or deliver every return so made by him to the clerk of the peace for the county, riding, division, liberty, city, borough, or place within which such division shall be situate, at such times as the court of quarter sessions for the same shall order in that behalf." Now county, riding, division, would always have a court of quarter sessions; liberty would not; but city, borough, or place may or may not, but they probably would. I think we must read the latter words liberty, city, borough, or place as ejusdem generis with county, riding, division, and as being places having courts of quarter sessions. The county justices are the justices who do the work, and the county bears the expenses of the prosecution, and where there is an appeal from the conviction it would be to the court of quarter sessions for the county, and the expenses would be defrayed from the county rate; and the intention of the legislature would be that the penalties should be paid into the fund which bore the expenses of the prosecution: otherwise the borough fund would receive the benefit and the county fund would have to bear the burden, and in the words of the judgment of the Court of Common Pleas in *Reg.* v. *Dale* (2), "It would be strange that the same word should give to one fund, the borough fund, all the penalties for good convictions, and charge

(1) 2 B. & A. 533.

(2) 22 L. J. (M.C.) 44, 47.

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upon another fund, the county rate, all the costs for convictions which could not be sustained." In that case the question was, whether a moiety of a penalty which by s. 26 of 9 Geo. 4, c. 61, is to be paid to the treasurer of the county or place for which the justices are acting, ought to be paid to the treasurer of the county or to the treasurer of the borough. The question there was decided on a different statute, and on the meaning of the word "place;" but the reasoning in that case is applicable to the present, and we avoid the inconsistency mentioned in the judgment by holding that "borough" is limited to places ejusdem generis with county, riding, and division, that is, to boroughs in which a court of quarter sessions is held.

LUSH, J. For the purpose of this decision, I import into the case the fact that the offences in respect of which the penalties were imposed were offences against the general law, and not under local statutes. In such a case, *Rex* v. *Amos* (1) decides that the justices are acting as county justices, though acting in the borough. If this be so, it seems to me that s. 31 is free from doubt; it says the clerk shall pay the penalty to the treasurer of the county, riding, division, liberty, city, borough, or place "for which such justice or justices shall have acted." The justices here have acted for the county, not for the borough. The section then proceeds: "The clerk shall keep a true account of all moneys received by him, and shall render such account unto the justices, who shall be assembled at the petty sessions for the division in which such justices shall usually act, and the said clerk shall send or deliver every return so made by him to the clerk of the peace for the county, . . . borough, or place within which such division shall be situate, at such times as the court of quarter sessions for the same shall order in that behalf." Now, there is no court of quarter sessions for the borough of Reigate, but only for the county, and if the clerk of the justices receiving a penalty is to pay it over to the treasurer of the county and render the return to the clerk of the peace of the county, that construction makes the section harmonious, and the provision is fair and reasonable: for if the culprit had gone to prison he would have been maintained by the county,

(1) 2 B. & A. 533.

and the borough is part of the county for these purposes; but if the penalty is to be paid into the borough fund it would be unfair, as then the borough would receive a benefit without participating in the burden. Our judgment, therefore, must be for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *Nicol & Son.*
Attorney for defendant: *F. F. Smallpiece.*

BROWN, APPELLANT; BUSSELL, RESPONDENT.
FRANCOMB, APPELLANT; FREEMAN, RESPONDENT.

Jan. 22.

Nuisances Removal Act, 1855 (18 & 19 *Vict. c.* 121), *ss.* 8, 12—"*Person by whose act or default*" *&c., the nuisance arises.*

By 18 & 19 Vict. c. 121, s. 12: "Where a nuisance is ascertained by the local authority to exist, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, who shall proceed to inquire into the complaint; and if it be proved to their satisfaction that the nuisance exists, the justices shall make an order on such person, owner, or occupier for the abatement or discontinuance and prohibition of the nuisance."

By s. 8, "Nuisance" includes any ditch or drain so foul as to be a nuisance or injurious to health, any accumulation or deposit which is a nuisance or injurious to health.

B. drained his premises into a barrel drain, which also received the sewage of other premises; this drain passed for about 300 yards under a turnpike road, and thence the sewage was conveyed by an open drain through certain land not B.'s, and ultimately into an open drain about half a mile from B.'s premises, by the side of a road on land not B.'s; this open drain was a nuisance, the matter from B.'s premises, in itself, being sufficient to cause a nuisance. On complaint, the justices, under s. 12, ordered B. to abate the nuisance by cutting off all communication from his premises to the barrel drain.

F. was the owner of six houses, let to tenants; he had constructed a drain from the houses under land not his own by leave of the owner, by which the sewage was conveyed into and along a watercourse, and the accumulation at the mouth of the drain was a nuisance. On complaint, the justices ordered F. to abate the nuisance:—

Held, that the orders were rightly made upon B. and F., for that they were the persons by whose act respectively the nuisances arose.

Quære, where several persons empty sewage into one place, and the aggregate becomes a nuisance, the amount contributed by each not being in itself suffi-

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cient to cause a nuisance, whether proceedings can be taken under s. 12 against any of such persons.

In proceedings under this act, the question whether or not the persons against whom the proceedings are taken, have a legal right to cause their sewage to flow in the given channel, &c., is immaterial.

BROWN, APPELLANT; BUSSELL, RESPONDENT.

CASE stated by Justices of Surrey under 20 & 21 Vict. c. 43.

The appellant is a brewer, residing and carrying on business at Esher, in the parish of Esher, in the county of Surrey; and he was summoned, with several other inhabitants of the parish, to answer a complaint made by the respondent, the officer for and on behalf of the committee of the Esher district, appointed by the guardians of the Kingston Union, for that a certain ditch or water-course, situate at Sandown Place, in the parish of Esher, and within the district, under the Nuisances Removal Act for England, 1855, of the respondent, was foul and offensive, and a nuisance injurious to health, and that the nuisance was caused by the act or default of the appellant and others.

The premises of the appellant are in the village of Esher, through which the turnpike road runs to Kingston-on-Thames. The open ditch complained of was proved by the respondent to be a nuisance injurious to health. It is on Ditton Marsh, by the side (on the right hand) of the turnpike road leading from Sandown turnpike gate to Kingston. The ditch commences close to the turnpike gate (about half a mile from the appellant's premises), and extends thence for some distance along the right-hand side of the turnpike road towards Kingston.

The appellant's premises formerly drained into a sand cave under the garden of one Isaac; about twenty-two years ago, the drain from the appellant's premises was first made through Isaac's garden to join the barrel drain or sewer; and ever since, up to the time of the complaint, the appellant and his predecessors have discharged their sewage and refuse water from the brewery into this covered barrel drain or sewer, which runs down the turnpike road from the village of Esher towards Kingston, and about 300 yards from the appellant's premises, and at the point marked L. (on the plan which was attached to the case,) turns to the right into and upon the

Sandown Place Estate, whereon it discharges itself into an open ditch or watercourse. The owner or occupier of such estate for many, but not twenty, years diverted and disposed of the sewage and refuse water, by turning or allowing it to run over meadow lands belonging to the estate, for the purpose of irrigating and fertilizing such lands. Such user and disposal of the sewage and refuse water was afterwards discontinued by such owner or occupier of the estate, and the sewage or refuse water was then turned by such owner or occupier into and down certain open ditches on the estate, which ultimately emerged from the estate, close to the Sandown turnpike gate, where it has caused the nuisance complained of. The present owner and occupier of Sandown estate was no party to the sewage being turned on the estate, and he objects to the same being turned on or allowed to run over his lands.

The course of the drain before it was diverted at the point L., was down the left side of the turnpike road to the Sandown turnpike gate, and thence to the left to a pond a short distance from the road; but a culvert was proved to have existed close to the turnpike gate, carrying the drainage under the turnpike road from the left side to the right side, and so into the present open drain complained of, before the drainage was diverted by the occupier of Sandown estate into his estate at the point L. (1)

(1) This paragraph was added by the justices in consequence of the Court having remitted the case to them, to state what was the former course of the sewage below the point L. before its diversion on to the Sandown estate.

The justices also added:—"The evidence of Isaac, (which was confirmed by entries in the Minute Book of the Turnpike Road Trustees, one of which is as follows:—'18th April, 1855. At this meeting the trustees present having taken into consideration the great nuisance affecting the turnpike road running through the village of Esher, by the overflowing of the filth and sewage arising through the drains which opened into the turnpike road, are of opinion that the principal cause of the nuisance arises from the brewery, now or late in the occupation of Whitburn, and the property of Mr. John Trigg. It is ordered that the surveyor of the turnpike road do take proper measures to stop up the opening of the drain from Mr. Whitburn's premises into the turnpike road, and that the clerk of the trustees do confer with Mr. Trigg thereon, it having been ascertained that Mr. Whitburn, without the consent of the trustees of this road, turned the filth arising from his premises into a drain running into the road')—proved to us that the road surveyor cut off the drain from the appellant's premises, and stopped it up by a slab stone placed across it about twelve years ago, a shed belonging to the witness Isaacs being pulled down to enable it to be done."

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No nuisance is complained of as arising from the said sewer or drain at any point in its course until after it passes the turnpike gate; but it was proved by the respondent that the offensive matter causing the nuisance complained of came from the premises belonging to and in the occupation of the appellant and the other persons summoned, by means of the covered barrel drain or sewer.

The appellant urged before the justices that, inasmuch as he had by user, as of right, for upwards of twenty years of the said drain or sewer, acquired a prescriptive right amounting to an easement to discharge his sewage and refuse water on the Sandown Place Estate, and no nuisance arose from the drain or sewer until it left the Sandown Place Estate at the turnpike gate, the nuisance complained of arose, not from the act of the appellant in making use of the sewer or drain, but from the act of the owner or occupier of the Sandown Place Estate in having (in lieu of using and disposing of the sewage or refuse water as formerly) caused the same to flow down the open ditches on his estate, and so out on to the Ditton Marsh by the turnpike road; and that the person by whose act, default, permission, or sufferance the said nuisance complained of arose or continued within the meaning of s. 12 of 18 & 19 Vict. c. 121, was the owner of the Sandown Place Estate, and not the appellant; and that therefore the appellant was not the person liable to abate the same or otherwise in respect thereof.

The justices decided that they could not regard any private rights between the appellant and the owner of the Sandown Estate, and they held that the appellant was the person by whose act or default the nuisance complained of arose, and they made an order requiring the appellant "within one week from the service of the order, or a true copy thereof according to the act, to abate the said nuisance by cutting off all connection between the drains of the said premises belonging to the appellant used for sewage purposes, and the drain or sewer leading to and entering the said ditch or watercourse, so that all communication for sewage purposes between the said premises of the appellant and the said ditch or watercourse do cease, and so that the same ditch or watercourse shall no longer be a nuisance and injurious to health as aforesaid."

The questions for the opinion of the Court were:—1. Whether on

the above facts the order was properly made upon the appellant? 2. Whether the order made on the appellant to cut off his drains for sewage purposes is a valid order? (1)

Field, Q.C. (*Jelf* with him), for the respondent. The discharge of the refuse from the appellant's brewery, coupled with the drainage from other premises, is the cause of the nuisance at the turnpike gate, and, therefore, though at some distance from the appellant's premises, the nuisance is caused by the act of the appellant within the meaning of 18 & 19 Vict. c. 121, s. 12, and he

(1) By 18 & 19 Vict. c. 121, s. 8, (The Nuisances Removal Act, 1855) "the word 'nuisances' shall include—any premises in such a state as to be a nuisance or injurious to health; any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit so foul as to be a nuisance or injurious to health; any animal so kept as to be a nuisance or injurious to health; any accumulation or deposit which is a nuisance or injurious to health."

By s. 10, notice of nuisances may be given to the local authority by any person aggrieved.

Section 12:—"In any case where a nuisance is so ascertained by the local authority to exist, or where the nuisance, in their opinion, did exist at the time the notice was given, and although the same may have been since removed or discontinued, is, in their opinion, likely to recur or to be repeated on the same premises, or on any part thereof, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the person, by whose act, default, permission or sufferance, the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before the justices in petty sessions, assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists, or did exist at the time when the notice was given, or if removed or discontinued since the notice was given, that it is likely to recur or be repeated, the justices shall make an order in writing under their hands and seals on such person, owner, or occupier, for the abatement, or discontinuance, or prohibition of the nuisance."

Section 13 authorizes the justices by their order to require the person on whom it is made . . . . "to drain, empty, cleanse, fill up, amend, or remove the injurious pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit which is a nuisance or injurious to health, or to provide a substitute for that complained of, or to carry away the accumulation or deposit which is a nuisance or injurious to health . . . . or to provide for the cleanly and wholesome keeping of the animal so kept . . . . or if it be proved to the justices to be impossible so to provide, then to remove the animal, or any or all of these things, according to the nature of the nuisance; or to do such other works or acts as are necessary to abate the nuisance complained of, in such manner, and within such time as in such order shall be specified."

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is therefore the proper person on whom, in the first instance, to make the order to abate; it is only if the person by whose act or default the nuisance is caused cannot be ascertained, that the order is to be on the owner or occupier of the premises on which the nuisance is. It is a fallacy to say that the nuisance cannot be said to be caused by the act of the appellant, because others contribute; it is sufficient if the person charged be shewn to contribute to the nuisance. Again, it may be said that when the nuisance is caused by the drainage of several houses, the drain should be covered, and proceedings taken under s. 22 to make the owner or occupier of each house contribute to the expense; but that section does not exclude the operation of s. 12; it is only an alternative mode of proceeding if the nuisance cannot be otherwise abated under s. 12. Section 33 enables the local authority to include, if they think fit, several persons in one complaint, "when proceedings are to be taken under this act against several persons in respect of one nuisance, caused by the joint act or default of such persons," and that shews that the statute in s. 12 contemplates proceedings to abate when the nuisance is caused by more than one person. Indeed, there would be few cases in practice where the nuisance would be caused by a single person.

J. S. Day for the appellant. The appellant has acquired a right to drain his premises into the barrel drain by twenty-two years user. Moreover, he cannot interfere with the course of the sewage on the Sandown estate, and if any one can be proceeded against under s. 12 as the person whose act causes the nuisance, it is the owner of the Sandown estate, or the person who diverted, by means of the culvert under the road, the drainage from its former course on the left of the road to its present position on the right.

[LUSH, J. The appellant discharges this refuse from his brewery by means of a drain, which *must* carry it to the spot where it causes the nuisance; why is it not his act which creates the nuisance, just as much as if he had discharged the noxious matter on the spot from a cart or by means of a shute?]

It cannot be said where many houses are drained into one spot that any one causes the nuisance.

[COCKBURN, C.J. That is a question of fact for the justices.]

FRANCOMB, APPELLANT; FREEMAN, RESPONDENT.

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Case stated under 20 & 21 Vict. c. 43, by Justices of Monmouthshire.

An information was preferred on the 13th of March, 1867, by the respondent, the inspector of nuisances for the Abergavenny district, against the appellant, for that in and upon certain premises situate at Llantillio Pertholey, the following nuisance exists, namely, a drain so foul as to be a nuisance and injurious to health, and that the said nuisance is caused by the act or default of the appellant, the owner of the premises, contrary to the statute.

At the hearing, the appellant and respondent appeared; Mr. Warr, the person whose premises the drain especially affected, also attended. The respondent gave the following evidence:—"On the 13th of February last, in consequence of complaint I received from Mr. Warr, I went up to the Mardee Llantillio Pertholey to examine a drain. I found a drain leading from appellant's premises into a small watercourse. The drain conveys the waste water, slops, &c., from five or six houses belonging to appellant, and from several pig-styes into the stream which flows into the respondent's premises. At the mouth of the drain there is an accumulation of black stinking filth, which must be very injurious to persons using the water. The water in the stream is polluted by it. Above the drain the stream is pure. The stream between the drain and Mr. Warr's premises contains a quantity of filth from the drain, which is the nuisance complained of. It is a nuisance, and injurious to health. There are two wells in Mr. Warr's garden, through which the stream runs, the wells being supplied with water solely from the stream. There is a deposit of filth in one of these, and the other is all filth from the stream. I gave appellant notice to remove the nuisance in seven days. On the 3rd of March instant I again visited the premises, which were in the same state, nothing having been done."

The appellant admitted having received a notice from the respondent, and gave the following evidence:—"I ordered the drain spoken of to be made to carry the refuse complained of under the road into the stream instead of allowing it to flow over the surface of the road, as it had done for forty years before and upwards.

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The road is a private one and not my property, but I had the consent of the owner to make the drain. There is not any nuisance, and it does not cause any. It conveys water, soap-suds, and slops only, and pig's stuff from the styes. The styes have been built on the site of old farm buildings, from which the refuse has flown over the surface of the road into the stream for forty years and upwards. There are four pig-styes, and six houses which are let to yearly tenants, and all are drained into the stream. I claim a right to run the refuse into the stream."

Two other witnesses briefly stated that the drain created no nuisance, and one of them stated that the refuse had run into the stream for forty years and upwards.

It was further proved that the watercourse, into which the drain emptied itself, originates in a spring in the neighbouring mountain, and after running through the appellant's property, pursues a course down the opposite side of the road leading by the houses referred to in the evidence; that at a point a few yards below the houses, the drain passing underneath the road, joins the watercourse, which then immediately enters Mr. Warr's premises, and after passing through his and other property, falls into the brook Henfy. Mr. Warr has constructed two wells in the watercourse on the premises, from which his tenants have for five or six years obtained water for drinking purposes, and the drain is of recent construction, having only been laid down in the month of November last. The stream was several years ago diverted by Mr. Warr from its original course, which was alongside of the property, and made to pass through the middle of it.

It was objected on behalf of the appellant, that he was neither the owner nor the occupier of the drain, or of the road in question, and that assuming the alleged nuisance did exist, the appellant, as owner of the premises from which the drain led, was not the proper person to summon, as it was not by his act or default the nuisance was caused or arose, but by the occupiers of the dwelling-houses and pig-styes from which the drain was conducted, and the occupiers were the persons who should have been summoned.

The justices were of opinion that the owner, under the circumstances above stated, was the person legally liable, and overruled the objection.

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It was also objected, on behalf of the appellant, that as the question of title was raised by the appellant claiming a right for the refuse to run from the premises in question into the stream, and as the drain and the road through which the drain was made were not his property, the justices had no jurisdiction to determine the complaint; but the justices, being of opinion that the drain running into the stream was a nuisance, and injurious to health, and as it had been laid down and constructed by the appellant, decided that such nuisance arose and was caused by the act, permission, or sufferance of the appellant, and that they had jurisdiction to hear and determine the matter of complaint; and they ordered the appellant to abate and discontinue the nuisance.

The questions for the opinion of the Court were:—1. Whether the appellant was the right person to be proceeded against under s. 12, 18 & 19 Vict. c. 121? 2. Whether the jurisdiction of the justices was ousted by the question of title or right?

The respondent did not appear.

Harington, for the appellant. It is the act of the occupiers of the cottages in using the drain, and not the act of the appellant, who merely made it, which causes the nuisance: *Rich* v. *Basterfield*. (1)

[COCKBURN, C.J. The appellant made the drain, and never parted with the possession and control of it.]

The drain, as far as can be made out from the case, is on no part of the appellant's land; but assuming it to remain in his possession, the appellant has a right to discharge it on Warr's land. At all events, there is good ground for the claim, and this ousts the justices' jurisdiction.

[COCKBURN, C.J. Under this statute the matter is quite independent of rights. The only question is whether there is a nuisance, and by whom it is caused.]

COCKBURN, C.J. If the nuisance were caused by the joint contribution of different persons in such a way as that the contribution of each would not in itself cause a nuisance, though the aggregate amounted to a nuisance, I should hesitate to hold that it would be competent to the justices to make an order prohibiting

(1) 4 C. B. 783; 16 L. J. (C.P.) 273.

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each person who contributes. But I understand that in the first case the quantity of matter contributed by the appellant alone in itself creates a nuisance. The only question, therefore, that arises is whether the nuisance, caused by matter coming from the appellant's premises, but at a considerable distance from his premises, is not sufficiently caused by the act of the appellant to enable the justices to proceed against him; and whether the order to abate ought not to be on the owner of the premises in which the nuisance exists. I do not think that is the proper construction to be put on s. 12. The nuisance being found to exist, the justices have to consider whose act it is that causes the nuisance; and it is only in the event of their not being able to ascertain whose act caused the nuisance that proceedings are to be adopted against the owner of the premises. In the first case, therefore, the appellant came within the provision of s. 12; and the justices rightly made the order upon him.

In the other case I can see no difficulty whatever. The drain, whether on the soil of the appellant or on the soil of another, was made by the appellant for the benefit of his several cottages, and, though they are let to tenants, the drain remains under his control; he, therefore, is the person by whose act the nuisance arises.

BLACKBURN, J. I am entirely of the same opinion. In order to a conviction under s. 12, it is necessary to find by whose act, default, permission, or sufferance the nuisance arises or continues; and I think the justices have found that the appellant is that person; they have found, in effect, that the appellant did send from his premises enough noxious matter into the drain to make a nuisance, and he does cause the nuisance. That is, he causes *a* nuisance, though others aggravate it. There may be cases where a number of persons contribute, the amount contributed by each not being sufficient to cause a nuisance, but the aggregate nevertheless amounting to a nuisance; as to whether the proceedings can, in such cases, be taken against each under s. 12 I express no opinion. But I take it s. 22 and s. 12 are not intended of necessity to apply to different things. In the first case, however, the appellant was clearly within s. 12, and the justices were authorized under that section to make an order upon him to abate the nuisance.

In *Francomb* v. *Freeman* the matter is perfectly plain. In *Rich* v. *Basterfield* (1) it was held that the landlord, who merely builds a chimney, and lets the premises with the chimney, the use of which causes a nuisance, is not liable. In the present case, the appellant being the owner of five or six houses, constructs a drain for the purpose of carrying off the drainage from them all; and whether he makes it on his own land, or by permission through the land of another, he keeps it under his own control, and he is exactly in the position which the defendant in *Rich* v. *Basterfield* (1) would have been in if he had kept the chimney in his own hands, and had let the rest of the premises as chambers, allowing the use of the chimney to the tenants. The appellant, therefore, is the person who maintains the nuisance; and whether or not, as between him and the person on whose lands the nuisance exists, the nuisance is legalized, is immaterial; under the present act it may be abated.

MELLOR, J. I am of the same opinion. Under s. 12 the primary duty is to ascertain by whose act or default the nuisance arises; then, if that cannot be ascertained, the proceedings are to be taken against the person on whose premises the nuisance is. The very origin of the jurisdiction is the bare existence of the nuisance, that is, a nuisance injurious to the public health; and, generally speaking, the question of title has nothing to do with the matter. Suppose it to be a disputed question, whether an open drain was made through land with the consent of the owner, the public health is not to suffer until this question is determined. The proceedings are to be, in the first instance, against the person whose act causes the nuisance; if he cannot be ascertained, then against the person who has the misfortune to have such a noxious easement on his land.

LUSH, J. I am also of the same opinion. A nuisance, within the act, may be either the state of premises, or any pool, ditch, privy, urinal, cesspool, drain, or ashpit, or any animal, or any *accumulation* or *deposit* which is a nuisance or injurious to health; and under s. 12 the first person who is to be held responsible is

(1) 4 C. B. 783; 16 L. J. (C.P.) 273.

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the person by whose act or default the nuisance arises; and in order to justify them in making an order, the justices must find the person who is the proximate cause of the nuisance, the person without whose act the nuisance would not have existed. In the first case, the act of the appellant is found to be the act without which the drain would not have been a nuisance. In the other case it is equally clear that the accumulation at the mouth of the drain was the act of the appellant, the person who built the drain by which the accumulation is brought there and maintains the drain for the use of his tenants.

Judgment, in each case, for the respondent.

Attorneys for Brown: *Walker & Sons.*
Attorney for Bussell: *Reddish.*
Attorney for Francomb: *R. J. Child, for Sayce, Abergavenny.*

Jan. 22.

SWEETMAN, APPELLANT; GUEST, RESPONDENT.

Justices, jurisdiction of—Proceedings to enforce Rate by Warrant of Distress—Limitation of Time for making "complaint" by 11 *&* 12 *Vict. c.* 43, *s.* 11—*"Exercise of summary jurisdiction" within* 20 *&* 21 *Vict. c.* 43.

By a local act for a borough, in case any person assessed to a rate under it should refuse or neglect to pay the rate for ten days next after demand, it was lawful for a justice of the borough, by warrant under his hand and seal, to authorize the collector to levy the rate by distress and sale of the goods of the person in default, or of the goods found on the premises; no time was fixed within which proceedings to enforce the rate were to be taken. By 11 & 12 Vict. c. 43, s. 11, in all cases where no time is specially limited for making "such complaint," it shall be made within six calendar months from the time when the matter of such complaint arose:—

Held, that "such complaint" referred to complaints mentioned in s. 8, viz., complaints "upon which a justice may make an order for the payment of money or otherwise," and that s. 11, therefore, did not apply to proceedings for enforcing a rate by the mere issuing of a warrant of distress.

Quære, whether these proceedings were "the exercise of summary jurisdiction by justices" within 20 & 21 Vict. c. 43, so as to enable them to state a case under that statute.

CASE stated by Justices of Kidderminster under 20 & 21 Vict. c. 43.

A complaint was preferred by the respondent against the appel-

lant under 53 Geo. 3, c. lxxxiii., "An act for paving, cleansing, lighting, watching, and otherwise improving the streets, &c. in Kidderminster," (1) alleging that the appellant was assessed in two rates duly made under the act, viz. on the 2nd of August,

(1) By 53 Geo. 3, c. lxxxiii. s. 67, the commissioners under the act "are empowered to appoint two or more inhabitants in the town to be assessors, and from time to time to issue their precept to the assessors, specifying how much in the pound shall be raised by taxation upon all messuages, tenements, buildings, and hereditaments within the said town, at the same rate, and in the same proportion as the same shall respectively be then assessed in the poor rate, and the assessors are authorized to rate the same accordingly, and the occupiers are made liable to pay the sum at which their respective premises shall be rated."

Section 68:—"All rates and assessments which shall be made in pursuance of this act as aforesaid, shall be allowed and signed by the said commissioners or any seven or more of them, and they shall and may have power to amend any such rates or assessments by inserting or causing to be inserted the name or names of any person or persons who ought to have been rated, and shall appear to have been omitted therein, or by taking out the name or names of any person or persons whose name or names shall have been inserted in any such rate or assessment, and who ought not to be rated, or by varying, altering, raising, or reducing the several and respective sum or sums of money which shall be charged, rated, or assessed, in such rate or assessment upon any person or persons whomsoever, regard being had to the then poor rate for the said borough, and such assessors shall appear, and bring with them at any time or place when thereto required by the said commissioners or any seven or more of them, or by the clerk for the time being, a true copy of such assessment, fairly written and subscribed by them, and shall deliver the same unto the said commissioners, and shall upon any reasonable notice, from time to time, attend upon the said commissioners at any of their meetings in pursuance of this act, or at any court or courts of quarter sessions for the said borough, or at any adjournment thereof or otherwise, as there shall be occasion, then and there to explain, amend and justify such assessments, and after the said rates and assessments are so made and confirmed, the said commissioners or any seven or more of them shall and may, and they are hereby authorized and required to cause the same to be collected and received as soon as may be, of and from the person and persons respectively on whom the same shall be rated."

Section 72:—"When and so soon as the said rate or rates, assessment or assessments, shall have been made and signed and allowed by the said commissioners or any seven or more of them as aforesaid, the collector or collectors appointed by the said commissioners shall, and he and they is and are hereby required to collect the same accordingly. And in case any person or persons who shall be rated, or assessed, or subject, or liable to the payment of any rate or assessment to be made, or laid, or made payable by virtue of this act, shall refuse or neglect to pay such rate or assessment to any collector to be appointed as aforesaid for the space of ten days next after personal demand made by the collector or collectors thereof, or

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1865, and on the 6th of March, 1866, respectively, and had neglected and refused to pay such rates to the respondent, the duly appointed collector, for the space of ten days next after demand in writing made by the respondent, and prayed that the justices would issue their warrant to levy the same by distress and sale of the appellant's goods.

The two rates were produced, and it was admitted by the appellant that he had not appealed to the council under the powers of the act; and that all the proceedings were regular, except that inasmuch as the two rates appeared to be signed by the assessors and allowed and signed by the council on different days, they were illegal and void, and could not be enforced against the appellant by distress.

It was also admitted by the appellant, that the statutory demand in writing had been made upon him, and that he had refused to pay: but the demand of the first rate being on the 14th of October, 1865, and of the other on the 29th of May, 1866, in both cases more than six calendar months before the date of the complaint, it was objected by the appellant that the justices had no power to issue a warrant of distress, by reason of Jervis's Act (11 & 12 Vict. c. 43), s. 11. (1)

The respondent contended that as no time was mentioned in

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demand in writing under the hand of such collector, left at the last or usual place of abode of the person or persons so refusing or neglecting to pay as aforesaid, or on the premises so charged with such rate or assessment, then and in every such case it shall and may be lawful to and for any justice of the peace of the said borough of Kidderminster, by warrant under his hand and seal to authorize and direct the said collector or any other person to levy such rate or assessment, and all arrears thereof by distress and sale of the goods and chattels of such person or persons so refusing or neglecting to pay as aforesaid, or on the goods and chattels so found on such premises, rendering the overplus (if any) to the owner or owners of the goods or chattels to be so distrained on demand, after deducting the costs and charges of recovering the same, and of such distress and sale;" or the commissioners may recover any such rate by action of debt, or on the case in any court of record at Westminster, or in any court of request.

All the powers of the commissioners under the act have been vested in the town council of the borough, by 5 & 6 Wm. 4, c. 76, s. 75.

(1) 11 & 12 Vict. c. 43, s. 8:—"In all cases of complaints upon which a justice or justices of the peace may make an order for the payment of money or otherwise, it shall not be necessary that such complaint shall be

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the 53 Geo. 3, c. lxxxiii., within which the rates must be allowed after having been made, the rates were perfectly good on the face of them, and that the 11 & 12 Vict. c. 43, s. 11, only applies to a case where justices are empowered on complaint to make an order for the payment of money.

The justices overruled both objections, and issued a warrant of distress.

The questions for the Court were:—1. Whether the variance of the dates in signing the rates by the assessors and of altering and signing them by the council acting as commissioners under the act, rendered the rates illegal? 2. Whether the justices' jurisdiction was ousted by 11 & 12 Vict. c. 43, s. 11?

F. T. Streeten, for the respondent. There is a preliminary objection that this proceeding is not the "exercise of summary jurisdiction" within the meaning of the 20 & 21 Vict. c. 43: *Ex parte May.* (1) However, whether or not the justices had power to state a case, it is quite clear that they were right in their decision on both the points submitted.

[*Harington,* for the appellant, intimated that he abandoned the objection to the validity of the rate.]

The second objection is equally untenable. In s. 11 of Jervis's Act "*such* complaint" must be referred back to s. 8, and the complaints there mentioned are "complaints upon which a justice may make an order for the payment of money or otherwise." In cases of enforcing rates by warrant of distress the order is made

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in writing, unless it shall be required to be so by some particular act of parliament upon which such complaint shall be framed."

Section 9 refers to proceedings upon information for offences punishable on summary conviction. Section 10 enacts the manner of making "every such complaint upon which a justice or justices are authorized by law to make an order," and the laying of "every information for any offence punishable on summary conviction."

Section 11:—"In all cases where no time is already or shall hereafter be specially limited for making any such complaint, or laying any such information in the act or acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

(1) 2 B. & S. 426; 31 L. J. (M.C.) 161.

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by the rate, and on proof of demand of payment under that order and of refusal or neglect to pay after the time named, in the present case ten days, the justices have nothing to do but issue their warrant of distress. Jervis's Act, therefore, cannot apply; and it is so laid down in Oke's Magisterial Synopsis (9th edit. p. 1165), and in other books of practice.

Harington, for the appellant. If the limitation of time in Jervis's Act does not apply, there is no limitation of time within which rates must be enforced.

[COCKBURN, C.J. How can it be said that a warrant of distress is an order for the payment of money? As to there being no limitation of time; in practice, those whose duty it is to collect rates lose no time in enforcing them when practicable; on the other hand, the mere collection of a rate frequently occupies more than six months.

MELLOR, J. Is not *Ex parte May* (1) directly in point against the appellant?]

The justices are not acting simply ministerially; they have to ascertain, for instance, whether the person summoned is the person rated, and whether due demand has been made upon him a sufficient time before the complaint; so that though no order is actually made, the discretion exercised in the granting or withholding the warrant is in the nature of a judicial act, and the granting the warrant may be said to be making an order. In *Sommerville* v. *Mirehouse* (2), it was conceded on all hands that in proceedings for enforcing a rate, the justices were acting judicially.

[*Streeten*, contrà. In that case the statute under which the rate was sought to be enforced required a complaint and an order by justices for payment before proceeding by distress.]

COCKBURN, C.J. It is impossible to say that we can interfere with this decision of the justices, inasmuch as Jervis's Act only applies to a complaint on which an order for the payment of money is to be made. In issuing a warrant of distress to enforce a rate, the justices are acting only ministerially and not judicially; and whether they had any authority to state a case or not, it is

(1) 2 B. & S. 426; 31 L. J. (Q.B.) 161. (2) 1 B. & S. 652.

clear that, as they had not to make any order, they were right in holding that the limitation in Jervis's Act did not apply.

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BLACKBURN, J. I am of the same opinion. Both points raise very much the same question. There is an appeal given by the act against the rate, and if the justices, on application for a warrant of distress, could entertain the question of the validity of the rate although good on the face of it, they might do so after appeal, and so review the decision of quarter sessions. Their duty in such a case is only ministerial, although they have of course to make some preliminary inquiries. And they have simply to grant or refuse the warrant, and not to decide anything judicially or make any order.

MELLOR, J. I am of the same opinion. The 20 & 21 Vict. c. 43, was intended to give justices an opportunity, when exercising summary jurisdiction, of getting advice on points of law in cases in which they had no means of doing so before the act.

LUSH, J. I am of the same opinion.

Judgment for the respondent.

Attorneys for appellant: *Hancock, Saunders, & Hawksford, for Henry Saunders, Kidderminster.*

Attorneys for respondent: *Robinson & Preston, for James Morton, Kidderminster.*

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Feb. 10.

BRIGGS *v.* BOSS.

Bill of Sale—Description of Residence and Occupation of Attesting Witness in affidavit under 17 & 18 *Vict. c.* 36, *s.* 1.

In the affidavit filed with a bill of sale under 17 & 18 Vict. c. 36, s. 1, the attesting witness, William Knight Moston, stated, "I reside at Hanley, in the county of Stafford, and am an accountant." Moston was clerk to a Mr. Hayes, an accountant, who lived at Manchester, and Moston managed the business for him at Hanley, Moston being allowed by Hayes occasionally to do accountant's business on his own account; the name of Hayes and not Moston was over the door of the place of business. The parliamentary borough of Hanley contains a population of 40,000 persons. Hundreds of letters had reached Moston by the post with the address of Hanley only:—

Held, that the affidavit contained a sufficient description of the residence and occupation of the attesting witness under 17 & 18 Vict. c. 36, s. 1.

THIS was an interpleader issue, in which the plaintiff claimed certain goods as grantee under a bill of sale, and the defendant was the execution creditor of the grantor.

At the trial before Gray, Q.C., at the Stafford summer assizes, 1867, a verdict passed for the defendant, with leave to move to enter it for the plaintiff, if the Court should be of opinion that the description of the residence and occupation of the attesting witness to the bill of sale, given in the affidavit filed with the bill of sale, was sufficient under 17 & 18 Vict. c. 36, s. 1. (1)

In the affidavit of the witness, William Knight Moston, he stated:—"I reside at Hanley, in the county of Stafford, and am an accountant."

Moston gave the following evidence:—"I sleep at 18, Alpha Place, Hanley, ten minutes' walk from my place of business, which is 24, Cheapside, Hanley. I am an accountant. The name of Moston is not over the door, but that of Hayes. I am clerk to Mr. Hayes, who is an accountant, and lives at Manchester; I manage the business for him at Hanley, and am allowed by him to do

(1) 17 & 18 Vict. c. 36, s. 1, requires the bill of sale or a copy to be filed in the Court of Queen's Bench within twenty-one days after the making or giving, "together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, ... and of every attesting witness to such bill of sale."

occasional business as accountant on my own account. Hanley contains a population of 40,000 within the limits of the parliamentary borough. Hundreds of letters have reached me by post with the address of Hanley only."

A rule having been obtained pursuant to the leave reserved,

H. James and *Anderson* shewed cause, and contended that the description of the residence and occupation was not sufficient. The witness was not an accountant, but an accountant's clerk. To enable strangers to find the witness, the description of the residence ought to have been more specific; the address might well be sufficient to enable the post-office employés, knowing the place, to deliver letters, but it did not follow that the same loose description would give sufficient information to a stranger without undue trouble. The statute at least required such a description as would enable a person, unacquainted with the neighbourhood, and desirous of communicating personally with the witness, to find him at once. They cited the following cases:—*Hewer* v. *Cox* (1); *Tuton* v. *Sanoner* (2); *Bath* v. *Sutton* (3); *Re Hams* (4); *Allen* v. *Thompson* (5); *Dryden* v. *Hope* (6); *Blackwell* v. *England.* (7)

Jelf, in support of the rule, was not heard.

BLACKBURN, J. I am of opinion that the claimant is entitled to the goods under the bill of sale (8), as I think the affidavit is sufficient. The statute requires that together with the bill of sale there should be filed an affidavit giving the description of the residence and occupation of the person making the bill of sale, and of every attesting witness to it. The object was that when a bill of sale is filed such a description of the person giving it, and of the witnesses to its execution, should be given as that persons, who may have had dealings with the grantor, or are otherwise interested in the matter, may receive such information as would enable them to trace out who is the person that is giving the bill,

(1) 6 Jur. N. S. 1139. 8 E. & B. 428; 30 L. J. (Q.B.) 73.

(2) 3 H. & N. 280; 27 L. J. (Ex.) 293. 4 Jur. N.S. 365

(3) 27 L. J. (Ex.) 338.

(4) 10 Ir. Ch. Rep. 100; 1 L. T. (N.S.) 467.

(5) 1 H. & N. 15; 25 L. J. (Ex.) 249. 2 Jur. N.S. 491

(6) 3 L. T. (N.S.) 280.

(7) 8 E. & B. 541; 27 L. J. (Q.B.) 124. 3 Jur. N.S. 1302.

(8) There were some other goods seized to the amount of 7*l.* 10*s.*, as to which it was admitted that the defendant was entitled to the verdict.

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and who are the attesting witnesses, so as to ascertain the bona fides of the transaction. The question is, what is such a sufficient description? If we were to require the minutest accuracy in these particulars, we should often upset an honest transaction; on the other hand, if we were to allow great looseness or any misdescription, we should be enabling parties to evade the statute. The description, as it seems to me, must be such as would enable a man readily and without difficulty to find out who the parties are. It is not enough that the description would not mislead, there must be sufficient to guide the person in his search. Now, in the present case, the attesting witness resided at Hanley, which is a town possessing 40,000 inhabitants within its parliamentary boundary, and he carried on the business or occupation of an accountant, as deputy for Mr. Hayes, who resided at Manchester, but he also was allowed to do business occasionally as an accountant on his own account. It would not be sufficient to constitute him an accountant, and make the description of accountant accurate, if his principal occupation were not that of an accountant; but where the facts are that in all respects he carries on an accountant's business, though chiefly for a principal, that is sufficient; and I cannot doubt that if any one inquired at Hanley for Mr. Moston, the accountant, he would have found him out as readily as under the description of clerk to Mr. Hayes, the accountant. Then as to the description of the residence; it would have been better, certainly, had it been more minute; but it is a question of degree: in some cases probably the street and even the number of the house would be proper and necessary, and I quite agree with the Irish case, *Re Hams* (1), that the description "of the city of Cork" in such a city as Cork would not be sufficient, unless, possibly, the person were one of the chief merchants there, but if he were in a lower rank it would certainly not be sufficient. Hanley, however, is a very different place, and I think under the circumstances the description would be sufficient to have enabled an inquirer to find the witness readily.

Mellor, J. I am of the same opinion. The policy of the statute is obvious: the difficulty is to ascertain, in each particular

(1) 10 Ir. Ch. Rep. 100; 1 L. T. (N.S.) 467.

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case, whether under the circumstances there has been a reasonable compliance with its requirements. I think on the whole the present description is sufficient, though, I confess, I hesitated at first in coming to this conclusion. The witness is an accountant, though a clerk to Mr. Hayes, but the latter resides at Manchester, and the witness is the person who does the accountant's work at Hanley; he really does represent the accountant's business there. As to the residence, the sufficiency of the description, where the name of the town only is given, must depend on the population of the place and the condition of life of the person. In the present case the evidence shews that there would be no difficulty in finding the witness under the given description of an accountant residing at Hanley.

LUSH, J. I am of the same opinion. I think the affidavit satisfies the requirements of the act. A residence is given, and an occupation; and the description is sufficiently minute to enable a stranger, making reasonable inquiries, to find out the person described. Primâ facie the description would not be sufficient; but the evidence shews that post letters with no fuller address than Hanley constantly reach him. Then as to the occupation, the addition of accountant to Hanley would enable a person at once to find the witness. It is true the description is not the whole truth; but he is in truth an accountant, although he is also in the employ of Hayes as an accountant. There is therefore nothing intended or calculated to mislead, and the description is sufficient.

Rule absolute. (1)

Attorneys for plaintiff: *Litchfield & Burton, for Litchfield, Newcastle-under-Lyme.*

Attorneys for defendant: *D. & S. Woolf.*

(1) See note (8) ante, p. 269.

1868
Feb. 1.

[IN THE EXCHEQUER CHAMBER.]

OGLE *v.* EARL VANE.

Damages, measure of, for Non-delivery of Goods under Contract of Sale—Forbearance of Buyer at Seller's request—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17.

The defendant by bought and sold notes contracted to sell to the plaintiff 500 tons of iron, delivery to extend to the 25th of July. Owing to an accident to his furnaces, the defendant delivered none of the iron by that date, nor up to the February following, when the plaintiff went into the market; and the price having risen since July, he sought to recover from the defendant, as damages for his breach of the contract of sale, the difference between the contract price and the market price in February. At the trial, correspondence was put in which had passed from August to February between the plaintiff, the defendant, and the brokers who had acted for both parties, and were still acting for the plaintiff; from this correspondence it appeared that the defendant repudiated his liability on the ground that the non-delivery was owing to inevitable accident, but he proposed that the plaintiff should take iron of a different quality; this, after consideration, the plaintiff declined; further negotiation ensued, and on the 29th of December the brokers wrote to the defendant that the persons who had contracts for his iron yet undelivered were pressing them extremely, and threatened to purchase against the defendant; adding, "when our Mr. T. was with you, he was informed that it might take three months to put the furnaces in repair, and we informed all our friends to this effect, and they have waited considerably over that time. . . When do you think we may promise deliveries?" The defendant simply acknowledged the letter, and said he could not say what it was intended to do with the furnaces. The jury having returned a verdict for the full amount claimed:—

Held, that there was evidence from which the jury might infer that the plaintiff's delay was at the defendant's request; that, as the evidence went to shew, not a new contract, but simply a forbearance by the plaintiff at the request of the defendant, the Statute of Frauds did not apply; and that the plaintiff was entitled to a verdict for the full measure of damages.

Appeal from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendant. (1)

The declaration was on three contracts, by which the defendant sold to the plaintiff certain iron, to be delivered at certain dates (setting out the terms of three bought and sold notes), that the iron was not delivered at the dates specified, claiming damages for the non-delivery.

Plea, payment of 100*l.* into court.

(1) Law Rep. 2 Q. B. 275.

Replication, damages ultra.

Issue thereon.

At the trial before Martin, B., at the summer assizes, 1866, at Manchester, it appeared that Messrs. Lockhart, Tozer, & Co., brokers, of Manchester, made in April, 1865, three contracts by bought and sold notes, signed by them as agents on behalf of the plaintiff and defendant respectively, by which the plaintiff, an iron merchant at Manchester, bought of the defendant, the proprietor of ironworks at Seaham Harbour, 500 tons of iron.

The first note was:

"April 18, 1865.

Sold R. Ogle, Esq., of Manchester, for account of Earl Vane, 200 tons No. 3 Vane and Seaham pig iron at 57*s.* per ton, less 2½ per cent. for cash; monthly payments; delivery equal to Manchester, and to extend over present quarter."

The second, dated April 22, was similar, for 200 tons; and the third, dated April 25th, also similar, for 100 tons, but the delivery was "to extend over three months."

In July, 1865, the blast furnaces in the defendant's ironworks suddenly gave way; and in consequence the defendant was prevented manufacturing iron; and none of the iron was delivered by the 25th of July, 1865."

Correspondence was put in evidence between Messrs. Lockhart, Tozer, & Co., Mr. Shaw (the defendant's manager at the ironworks), and the plaintiff, of which the following letters are the most material:—

W. Tozer, for Lockhart, Tozer, & Co., to Shaw. "Aug. 5, 1865.

If Messrs. Bayley & Co. can arrange with their customer to take No. 4 foundry iron in place of No. 3 at 1*s.* per ton less than their contract, shall I agree with them to furnish it, and can I do the same with Ogle? With the latter I have as yet said but little, as he has been out of town, and only returned a day or two since."

Shaw to Lockhart, Tozer, & Co. "August 7, 1865.

In reply to your favour of the 5th inst., I beg to inform you that, having No. 4 foundry on hand, I am willing to let Messrs. Bayley and Ogle have it at 1*s.* per ton less than the price offered

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for No. 3, being most desirous of accommodating our customers as far as lies in my power; but please to remember that I do not hold Earl Vane liable to deliver in consequence of the accident to the furnaces until they are repaired."

Plaintiff to Shaw. "August 10, 1865.

As I have informed Messrs. Lockhart, Tozer, & Co., some of my constituents to whom I have sold the 500 tons No. 3 V. & S. which I purchased from you are pressing for deliveries. Mr. Tozer informs me that you cannot deliver any No. 3 for some time to come, and that you have only No. 4 foundry in stock. If I could persuade some of my friends to take No. 4 in lieu of 3, what allowance would you make per ton? I don't consider that less than 2s. would be any inducement to them to use it, as most founders have a decided objection to No. 4 North of England iron. Awaiting the favour of your reply in course."

Shaw to Plaintiff. "August 11, 1865.

In reply to your note of the 10th inst., I can let you have foundry 4 at 46s. per ton, in lieu of No. 3, but if you require No. 3 I fear you will have to wait until the furnaces are repaired and blown in, which will be some time."

Lockhart, Tozer, & Co., to Shaw. "October 14, 1865.

Some time since we sent an order for some iron No. 3 for R. Ogle, and at same time for Bellhouse & Co. The latter has been received, but we have heard nothing of the former. Mr. Ogle is most anxious for delivery. Will you please advise us if it is off, or any portion thereof."

Shaw to Lockhart, Tozer, & Co. "October 16, 1865.

In reply to your favour of the 14th inst., I have no No. 3 in stock."

Lockhart, Tozer, & Co., to Shaw. "October 25, 1865.

Will you transfer balance of Bayley & Co.'s contract, as per accompanying note? We understand from Bayley the delivery is not guaranteed for two to three months at least."

Shaw to Lockhart, Tozer, & Co. "October 26, 1865.

In reply to your note of the 25th inst., I am unable to say when I can send away iron from the furnaces."

Lockhart, Tozer, & Co., to Shaw. "December 16, 1865.

We enclose two letters received this week from parties holding contracts for Vane and Seaham pig iron; will you please advise us on the subject, as we cannot any longer make them wait for the iron?"

Lockhart, Tozer, & Co., to Shaw. "December 29, 1865.

We beg to advise you that those customers who have contracts for your iron yet undelivered are now pressing us extremely, and are threatening to purchase against you, charging you with the difference in amount. When our Mr. Wm. Tozer, from Manchester, waited upon you he was informed that it might take three months to put the furnaces into repair, and we informed all our friends to this effect, who have waited considerably over that time. Now they consider that their contracts are entitled to attention. Will you have the goodness to inform us of the present position of affairs, and say when you think we can promise deliveries? The iron is now very sound and strong, and we think there is a good time for the trade before us."

Shaw to Lockhart, Tozer, & Co. "January 2, 1866.

Your favour of the 29th ult. came duly to hand, and in reply I beg to say that at present I cannot say what it is intended to do with the blast furnaces."

Lockhart, Tozer, & Co., to Shaw. "January 18, 1866.

We enclose letter sent us this morning by Mr. Ogle's solicitors. Will you please advise us immediately what course you wish us to pursue, as we expect Hall & Pickles will pursue the same course?"

Shaw to Lockhart, Tozer, and Co. "January 19, 1866.

Your favour of the 18th inst., enclosing letter from Messrs. Slater & Barling [plaintiff's solicitors], came duly to hand, and in reply I can only say that, as the blast furnaces suddenly gave way, and were not blown out, and no iron having been made since, it is a casualty all buyers are subject to."

Lockhart, Tozer, & Co., to Shaw. "February 9, 1866.

We are sorry to again trouble you, but we cannot help, as we have put off and put off our customers till now they seem determined to bring matters to a focus. We wrote you on Monday, with copy of letter from Mr. Ogle's attorneys. We now enclose

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another from that firm, and ask your attention to it. Mr. Hall, of Hall & Pickles, has given us notice that he shall commence to suit himself unless you make the best efforts to get the furnaces in blast or to give him other iron. Bellhouse & Bayley are also threatening us."

Shaw to Lockhart, Tozer, & Co. "February 10, 1866.

Your favours of the 6th and 9th instant came duly to hand. I should like to have a copy of the contracts entered into with the different gentlemen, as I am aware in more instances than one when they were not fulfilled to the time we had no redress."

W. Tozer for Lockhart, Tozer, & Co., to Shaw. "Feb. 13, 1866.

Yours received during my absence from home. I enclose copy of the sale note as furnished Ogle and others. I have also received another communication this morning from Dalham Forge Company. They will not wait any longer for their iron, but say they shall buy, and charge you the difference."

The plaintiff bought in the market in February, 1866, the market price having risen continuously from June, 1865, to February, 1866, and he commenced his action on the 8th of February, claiming as damages 237*l.* 10*s.*, the difference between the market price in February, 66*s.* 6*d.* per ton, and the contract price, 57*s.*, of 500 tons of iron of the quality contracted for.

The defendant's counsel submitted that there was no legal evidence to go to the jury to shew that the plaintiff was entitled to more damages than the difference between the contract price and the market price at the end of July, 1865, when the contracts were broken; and it was agreed that the 100*l.* paid into court was sufficient to cover this.

The learned judge reserved the point; and the jury having returned a verdict for 137*l.* 10*s.*, the balance of the sum claimed, leave was reserved to move to enter it for the defendant, if the Court should be of opinion that there was no evidence to go to the jury of the plaintiff being entitled to more damages than the sum paid into court.

A rule having been obtained accordingly, the Court of Queen's Bench, after Hilary Term, 1867, discharged it. (1)

(1) Law Rep. 2 Q. B. 275.

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T. Jones, Q.C. (*Crompton* with him), for the defendant. Each party contracts with reference to the damages which will arise if the contract is broken; and Shaw, the defendant's agent, has never undertaken to do more than the law implies from the contract to deliver in July, viz., to pay the difference between the then market price and the contract price. Either there is a contract void under the Statute of Frauds, or there is no contract enabling the plaintiff to recover these larger damages; otherwise the defendant would be bound, and the plaintiff be at liberty. Suppose the price had fallen between July and February, the plaintiff would still have been entitled to the 100*l.*, the difference between the market price in July and the contract price. This right has never been abrogated unless there was a fresh contract; but if there was no new contract, and the price of iron had fallen, the defendant could not have called upon the plaintiff to accept the iron after July. Again, in none of the letters has Shaw asked the plaintiff to wait; on the contrary, he repudiated all liability, but added, "you had better wait."

[KELLY, C.B. Was it not for the benefit of the defendant that the plaintiff waited?]

The waiting was a mere speculation on the part of the plaintiff; he knew he could always claim the 100*l.*

[MONTAGUE SMITH, J. Suppose the defendant had actually written in July, "Do not go to this market, but wait," and the plaintiff had waited?

KEATING, J. The statement in the letter of the brokers of the 29th of December, 1865, coupled with the answer of the defendant of the 20th of January, 1866, which contains no denial of the statement, amounts to that.]

These are mere extrinsic circumstances which cannot be looked at. In *Brady* v. *Oastler* (1), in measuring the damages the Court refused to look beyond the contract. Pollock, C.B., there says: "When a contract is broken, and an action is brought for damages, the heads of damage are for the Court; the amount of damage under each head for the jury; and I think the heads of damage must be determined by the contract itself, as finally agreed upon by the parties, and put into writing."

(1) 3 H. & C. 112, 127; 33 L. J. (Ex.) 300, 305.

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[KELLY, C.B. What was shut out in that case was what had occurred before breach.]

That makes no difference. An agreement in writing cannot be varied by a subsequent parol agreement; the original agreement remains in full force: *Noble* v. *Ward.* (1) In the court below both judges base their decision on the ground that there was no new contract; but it is a contradiction in terms to say that there is no new contract, and yet that the defendant is bound to pay damages to which he was not liable under the original contract.

Holker, for the plaintiff, was not heard.

KELLY, C.B. We are of opinion that the judgment of the Court of Queen's Bench must be affirmed. There was a contract on the part of the defendant to deliver a quantity of iron, say, by the 25th of July, and when that time arrived none of the iron had been delivered. The defendant's furnaces had met with an accident, and he was therefore unable to prepare the iron, and so unable to perform his contract; and there can be no doubt that the plaintiff was entitled to commence an action at once, and if he had, the damages would have been measured, according to the ordinary rule, by the market price at which the plaintiff could have purchased the iron at that time. But, in consequence of a written correspondence and some personal communication, we find the plaintiff forbearing to sue, and the defendant continuing to fail to deliver the iron. It may be that on this correspondence we cannot collect that there was any new binding contract on the plaintiff to forbear for even an indefinite term, nor on the defendant to deliver the iron. It is also true that the defendant in effect denies his liability; but that did not put the plaintiff under any obligation to reply that the defendant was liable, and that the plaintiff held him so liable. This is what takes place: the defendant (for what Shaw did may be taken as done by the defendant), who has broken his contract, and is then liable for the breach, writes to the plaintiff, and proposes to deliver as a substitute for the iron under the contract a different kind of iron. The plaintiff proceeds to take this proposal into consideration, and ultimately it comes to nothing, the persons with whom the plaintiff had sub-contracts

(1) 4 H. & C. 149; Law Rep. 1 Ex. 117.

refusing, from whatever may have been the cause, to accept the substitution: and the proposal is not accepted by the plaintiff. But surely the very proposal itself implies a request, in all courtesy, as between men of business, that the plaintiff will not commence an action at once, but delay, in order to see whether a compromise cannot be effected; and surely whether there was that implied request, and consequent delay on the part of the plaintiff, was matter for the consideration of the jury in estimating the damages the plaintiff was entitled to. But the case does not stop there: there is the letter of the 29th of December, pointed out by my Brother Keating, which shews that a personal communication had taken place between the brokers, or one of them, and Shaw, the defendant's agent, and the broker had been informed that it would take three months to put the furnaces in repair, and that this information had been communicated to "all" the brokers' "friends," of whom the plaintiff was one, and they had waited for the three months and more. Surely, again, this communication from the defendant implied a request to the plaintiff and the other parties to forbear, and the plaintiff's waiting was an acquiescence in this request. Can it reasonably be contended that that which has been called a rule of law as to the measure of damages, but which is rather a mere rule of practice, is to prevail under all circumstances? It would be contrary to common sense and justice, when there has been a series of proposals by the defendant involving delay for his own benefit, and acquiescence on the part of the plaintiff, that because there may be no binding contract, varying the terms of the former contract, the plaintiff is to be tied down to the strict letter of the rule as to the measure of damages for the non-delivery of goods, and not be entitled to the damages consequent upon the delay. I think, without entering into the question whether there is such a positive rule of law or not, we cannot do otherwise, under the circumstances of the present case, than hold the plaintiff to be entitled to the larger measure of damages.

WILLES, J. I am of the same opinion. I should like to add, however, that it appears to me there was in this case, in point of fact, a contract to purchase forbearance,—that is, there was, I think, evidence for the jury, who were the proper judges. There

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was evidence on this correspondence that the plaintiff did assent to forbear, upon the understanding that in the end he was to have iron to the extent contracted for, in satisfaction of any claim that he might have on the original contract; and, as it appears to me, there is not the absurdity, as put by Mr. Jones, in saying there was a contract and no contract—a contract to affect the damages, and no contract to give a fresh cause of action; and for this reason—that the contract, which did exist in fact, cannot be sued on at law, by reason of the old rule that an accord not followed by satisfaction was inoperative to give the defendant a defence, or to give the plaintiff a new remedy. The defendant would have no defence, because there was no satisfaction, and the plaintiff would have no new remedy if iron was not delivered, because he could not recover twice over. That is the true reason why the judges in the court below said there was no contract: there being no contract that could be enforced at law. But I never heard that that technical rule, as to no action lying on a bare accord, prevented an arrangement, by which, in such a case as this, buying in against a contract is carried over from one market to another, being so far operative as to affect the measure of damages on the original contract; and, for the reasons stated by the Lord Chief Baron, I entirely agree that there was evidence for the jury that what passed between the parties amounted to such an arrangement; and the measure of damages was, therefore, to be taken at the time when the purchase was made by the plaintiff, and not according to the general rule relied on by Mr. Jones, to which this case furnishes an exception, so far as that the plaintiff's right to purchase was carried over from July by the defendant requesting forbearance and the plaintiff assenting to the request. The defendant, in effect, bought forbearance, and must pay for it.

CHANNELL, B., and KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Slater & Dommett, for Slater & Barling, Manchester.*

Attorneys for defendant: *Young, Maples, & Co., for H. B. & C. Wright, Sunderland.*

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Feb. 13.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Composition Deed, Inequality of—Covenant direct with assenting Creditors, and through a Trustee with others.*

By a deed under s. 192 of the Bankruptcy Act, 1861, it was agreed that a composition should be accepted by the creditors of 7*s.* 6*d.* in the pound, in full satisfaction of their respective debts, the composition to be payable by three equal instalments at four, eight, and twelve months from the registration of the deed, the payment to be secured by promissory notes of the debtor and a surety; and there was a covenant by the debtor with the creditors executing the deed to give them promisssory notes accordingly, and a similar covenant with a trustee on behalf of the non-executing creditors; and in consideration of the premises the creditors covenanted not to sue for their original debt, this provision to be pleadable in bar as a release if they did; provided that if the promissory notes should not be duly tendered to any creditor, the provision as to not suing should be void as against such creditor:—

Held, that the deed was neither unequal nor illusory, but was valid under s. 192.

DECLARATION for goods sold and delivered.

Plea, setting out an indenture, between the defendant (the debtor) of the first part, the creditors whose names and seals were affixed of the second part, a surety of the third part, and a trustee for the creditors not executing of the fourth part. The deed recited that the debtor was unable to pay his debts in full, and that the parties of the second part had agreed to accept a composition of 7*s.* 6*d.* in the pound, in full satisfaction of their respective debts, such composition to be payable by three equal instalments, at four, eight, and twelve calendar months from the date of the registration of the deed, the first instalment to be secured by a promissory note of the debtor, and the others to be secured by the joint promissory notes of the debtor and his surety; and that it was agreed that the deed should be binding as far as it might legally be on all the creditors, whether assenting to it or not. The debtor covenanted with the several parties of the second part that he would, within four, eight, and twelve calender months from the date of registration, deliver to all his creditors the said promissory notes as aforesaid, and the debtor covenanted with the trustee

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to deliver the like promissory notes to any creditor not a party to the deed, for the said composition of 7*s.* 6*d.* in the pound. It was further witnessed, that, in consideration of the premises, none of the creditors parties to the deed, or assenting in writing, would sue, arrest, &c., the debtor for or on account of any debt, then owing, and if any creditor should fail to observe the provision, the debts of the creditor would be irrecoverable, and this provision might be pleadable in bar as a release or discharge of such debts, without prejudice to the above covenant of the debtor; and this provision should, as far only as the assenting creditors could lawfully make it binding, apply to, and be binding on, non-assenting creditors. Provided that, if the promissory notes should not be tendered to the several creditors of the said debtor on or before the expiration of four, eight, and twelve calendar months from the date of registration, then the provision against suing should, as to the creditor to whom such composition should not be so paid as per deed, be void. It was finally agreed and declared that the deed should operate and all questions thereon be determined under the Bankruptcy Act of 1861 as to trust deeds, &c.; and any clause not in conformity with that act should be binding only on the executing or assenting creditors.

The plea then alleged that all the conditions under s. 192 had been complied with, and that the plaintiff was a creditor at the time of the execution of the deed, and all conditions precedent having happened the plaintiff was bound by it.

Demurrer and joinder.

Kemplay, in support of the demurrer. The first objection to the deed is, that it is unequal, inasmuch as it puts the executing creditors in a better position than the non-assenting, the covenant to give the promissory notes being direct with the former class, but only through the medium of a trustee as to the latter.

[LUSH, J. But if the defendant does not give the promissory note to any creditor he may recover the whole debt.]

That makes the deed merely illusory, for there being no cessio bonorum, this clause puts it in the power of the debtor to favour any one creditor by omitting him, while giving the other creditors promissory notes.

[BLACKBURN, J. That very point was decided in favour of the deed by the Exchequer Chamber in *Clapham* v. *Atkinson*. (1)]

The point was not much pressed in that case; and WILLES, J., was of opinion that the deed was illusory.

[BLACKBURN, J. Why are we to assume a fraudulent intent on the part of the debtor? for that is what the objection amounts to. A man after his discharge as a bankrupt, or after an absolute release under one of these deeds, may pay any creditor in full.]

In *Clapham* v. *Atkinson* (1) there was no covenant in the deed, so that all the creditors had only the same remedy if the composition was not paid, viz., suing for their original debt. *Benham* v. *Broadhurst* (2) is very much in point; in that case the deed was held invalid by the Exchequer Chamber, because there was a covenant which the Court interpreted only enabled a portion of the creditors to sue for the composition.

[BLACKBURN, J. The non-assenting creditors had no remedy in that case.]

There was no practical difficulty in putting all the creditors on precisely the same footing, by making the covenant with the trustee for all.

[BLACKBURN, J. The difference is really not substantial, viz., the possibility that a non-assenting creditor may be called upon to give security for costs to the trustee.]

That causes great inequality; the non-assenting creditor may be unable to give security.

[LUSH, J. After all, what is the practical value of the covenant? If the composition be unpaid there is no release, and the non-assenting creditor, although he can only sue in the name of the trustee for the 7*s.* 6*d.*, can sue in his own name for the 20*s.*]

So in *Benham* v. *Broadhurst* (2) the deed only released the whole debt conditionally on the composition being paid.

Prentice, Q.C. (*Hance* with him), for the defendant, was not heard.

BLACKBURN, J. By s. 192, every deed made between a debtor and his creditors, or any of them, or a trustee on their behalf,

(1) 4 B. & S. 730; 34 L. J. (Q.B.) 49.

(2) 3 H. & C. 472; 34 L. J. (Ex.) 61.

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relating to the debts and liabilities of the debtor and his release therefrom, or the distribution of his estate, is to be as valid and binding on all the creditors as if they had executed the deed, provided certain conditions have been observed. It is said that the present deed is not such a deed as the requisite majority of the creditors had authority to make, so as to bind the other creditors by it. No doubt the deed must be for the purposes contemplated by the section; and it has been held, most properly, that a deed which would favour one creditor at the expense of another would not be such a deed. The objection to the present deed is, that it does not put all the creditors in the same position; all are to have promissory notes to the amount of 7*s.* 6*d.* in the pound on their respective debts, in which case the debt is to be released; and if any do not receive such promissory notes they may sue for the whole amount of their debt; but, in addition, the defendant covenants with the creditors executing the deed and with a trustee on behalf of the non-executing creditors, to give these promissory notes; and it is said that this superadded covenant (though held unnecessary in *Clapham* v. *Atkinson* (1), on the very ground that, if the composition was not paid the creditors could enforce the payment of their whole debts,) makes the deed unequal, because it is directly with the executing creditors, and only through the medium of a trustee as to the others. Now, the inequality in order to vitiate a deed must be shewn to be really a substantial inequality. But all the inequality here is, that in enforcing this not very necessary covenant, one creditor can sue in his own name, while another may possibly have to give a satisfactory indemnity to the trustee for costs, which he very possibly may not be able to give; but I cannot see that this is a substantial inequality, even apart from the fact pointed out by my Brother Lush, that a non-executing creditor if not paid the composition, though he cannot sue in his own name for the 7*s.* 6*d.*, can sue in his own name for the 20*s.* It was also said that this made the deed illusory; I have already answered this; and I think if we were to give effect to either of these objections we should be going far to justify the observation which was at one time made, that the Courts, in dealing with these deeds under the Bankruptcy Act, 1861, had reversed

(1) 4 B. & S. 722, 730; 34 L. J. (Q.B.) 49.

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the maxim and construed them ut res magis pereat quam valeat. As to the case of *Benham* v. *Broadhurst* (1), as far as it goes, it makes rather in favour than against this deed; for Crompton, J., who went as far as most judges against these deeds, when delivering the judgment of the Court, seems to be of opinion that a covenant by the debtor with a trustee for the non-assenting creditors would have cured the difficulty.

LUSH, J. I am of the same opinion. If the case in the Exchequer Chamber, *Benham* v. *Broadhurst* (1), were on all fours with the present case, we should of course be bound by it; but it is clearly distinguishable; in that case, the non-assenting creditors had no remedy, and it was thrown out by the Court that if there had been a covenant with a trustee on their behalf, as there is in the present case, the inequality would have been removed.

Judgment for the defendant.

Attorneys for plaintiff: *Hawkins, Paterson, & Co.*
Attorneys for defendant: *Satchell & Chapple.*

(1) 3 H. & C. 472, 481; 34 L. J. (Ex.) 61.

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Jan. 30.

ROLLE, Appellant; WHYTE, Respondent.

Salmon Fishery Act, 1861 (24 & 25 *Vict. c.* 109), *ss.* 12, 27—*Fishing Weir—Non-navigable river*—12 *Edw.* 4, *c.* 7—*Jurisdiction of Commissioners—Easement*—2 & 3 *Wm.* 4, *c.* 71.

The appellant is the owner of land lying on the right bank of the river Taw. The river runs from south to north, and is not navigable at the part in question. Opposite to the appellant's land there are, on his side, at a distance of about fifteen feet from the shore, two small islands belonging to the appellant, separated from each other by a narrow interval. At the southern or uppermost extremity of the two islands there has been from time immemorial between the island and the main land a fender, and lower down the stream certain wooden needles, shaped in the form of a V, with an opening in the lower end, such lower end being placed up the stream, through which salmon, on their passage up the river, make their way, and are then caught. This was the appellant's old fishing-weir. About sixty or seventy years ago, the two islands then forming only one, a predecessor of the appellant made an opening towards the lower part of the island, so that the one island was converted into two, and a portion of the stream was able to flow through the opening, and to pass between the lower island and the right bank of the stream. At this opening a fender was placed, which, like the old one, enabled the owner of the island to command the flow of water. The needles were then removed from their original position to a spot lower down the stream, between the second island and the main land. The weir thus altered had not, so far as its use as a fishing-weir was concerned, been interfered with by other riparian owners on either side of the river; but the use of the fender at the opening between the islands had been at times interrupted by the occupiers of the mill situate on the opposite bank. From the north-western extremity of the innermost of what are now the two islands, there has been from time immemorial a dam, extending diagonally across the stream to the mill, the effect of which, together with the mill, was to turn the body of the water to the mill. The effect of the new-made opening being to let a portion of the water escape, and so to interfere with the working of the mill; when the water was low the miller was accustomed to insist upon the new fender being put down, which was always acquiesced in by the appellant.

Upon these facts the commissioners under the Salmon Fishery Acts made two orders: they held the old weir to be legal as having existed prior to the time of Edw. I, and ordered a fish-pass to be made in it according to the provisions of ss. 12 and 27 of 24 & 25 Vict. c. 109; they further held the more recent part of the existing weir to be illegal, and ordered its removal, on the assumption that by 12 Edw. 4, c. 7, no easement of a fishing-weir can have been legally acquired since the beginning of the reign of Edw. I. by a riparian owner in a non-navigable river:—

Held, that the first order was bad: for that s. 12, which enacts that "no fishing-weir, although in use at the time of the passing of the act, shall be used for the purpose of catching salmon, unless it have therein such free gap as hereinafter mentioned," applies only to such weirs as come within s. 27, that is to fishing weirs "extending more than half-way across any stream at its lowest state of

water," and that the fifteen feet of water flowing between the appellant's island and the main land was not a stream within the meaning of s. 27.

Held, also, that the second order was bad: for that 12 Edw. 4, c. 7, relates to navigable rivers only, and that though weirs in navigable rivers are illegal unless they existed before the time of Edw. I, such an easement might be acquired in private waters by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted.

Held, also, that the interruption to the use of the weir by the acts of the occupier of the mill did not prevent the appellant from acquiring the qualified easement under 2 & 3 Wm. 4, c. 71.

Held, also, that, as it must have been the intention of the legislature to preserve existing rights, however acquired, the weir was within the reservation in s. 12 of 24 & 25 Vict. c. 109.

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CASE stated by the Special Commissioners for English Fisheries, pursuant to the Salmon Fishery Amendment Act, 1865, which (s. 45) incorporates 20 & 21 Vict. c. 43.

2. By the Salmon Fishery Act, 1865, 28 & 29 Vict. c. 121, ss. 40 and 42, the special commissioners were authorized to inquire into the legality of all fishing-weirs, fishing mill-dams, and fixed engines, used for catching salmon throughout the limits of the Salmon Fishery Acts, 1861 and 1865, and to remove such fixed engines and fishing-weirs, and cause to be rendered incapable of catching fish such fishing mill-dams as were in contravention of the Salmon Fishery Act, 1861.

3. And by s. 44, on the appearance of the owner, or other persons for or against any fishing-weir, fishing mill-dam, or fixed engine, and after hearing what, if anything, is alleged by him or them, or on his or their behalf, the commissioners are empowered to decide as to the legality or illegality of such fishing-weir, fishing mill-dam, or fixed engine, and in the event of their decision being in favour of its illegality, they may make such further order or orders thereupon, as mentioned in that section.

4. By s. 4 of the Salmon Fishery Act, 1861, which is to be read as one with the Act of 1865 (see 28 & 29 Vict. c. 121, s. 2), it is enacted, that fishing-weir shall mean a dam used for the exclusive purpose of catching, or facilitating the catching of fish, and dam shall mean all weirs and other fixed obstructions used for the purpose of damming up water, and that "fishing mill-dam" shall mean a dam used, or intended to be used, partly for the purpose of catching, or facilitating the catching of fish, and

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partly, for the purpose of supplying water for milling or other purposes.

5. At the hearing of the case before the commissioners at Barnstaple, the appellant made his claim to use the contrivances for the capture of salmon hereinafter particularly mentioned, describing them in his claim as a hutch-box, crib, or enclosed place in connection with a fishing mill-dam, situate in the river Taw, at the Barton of Brightley, near Umberleigh Bridge, in the parish of Chittlehampton, in the county of Devon; and contended that they were lawfully in use by virtue of grant, charter, or immemorial usage, at the time of the passing of the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109). (1)

6. At the place in question the river Taw is not navigable; but it begins to be navigable about three miles lower, and the appellant is the riparian owner on the right bank for about a mile, while Mr. Bassett is the riparian owner on the left or opposite bank, the lands of the appellant adjacent being part of the old manor of Brightley. On the left bank there is an ancient mill belonging to Bassett, and there is also a dam which is built across the river. The dam is built diagonally across the current, to an island marked No. 1 on the plan, nearly in the middle of the river, continued thence to another island, marked No. 2 on the plan, nearer to the right bank. From the upper

(1) 24 & 25 Vict. c. 109, s. 12:— "The following regulations shall be observed with respect to dams: 1. No dam, except such fishing-weirs and fishing mill-dams as are lawfully in use at the time of the passing of this act, by virtue of a grant or charter or immemorial usage, shall be used for the purpose of catching or facilitating the catching of salmon. (1) Any person catching or attempting to catch salmon in contravention of this section, shall incur a penalty not exceeding 5*l.* for each offence, and a further penalty not exceeding 1*l.* for each salmon which he catches. (2) All traps, nets, and contrivances used in or in connection with the purpose of catching salmon, shall be forfeited. (3) All salmon caught in contravention of the above prohibition shall be forfeited: And no fishing-weir, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon, unless it have therein such free gap as is hereinafter mentioned; and no fishing mill-dam, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon, unless it have attached thereto a fish-pass of such form and dimensions as shall be approved of by the Home Office; nor unless such fish-pass has constantly running through it such a flow of water as will enable salmon to pass up and down such pass, but so, nevertheless, that such pass shall not be larger nor deeper than requisite for the above purposes."

REFERENCE.

A *M. Rolle's upper Fish trap Fenders.*
B *Dº Dº Dº Needles.*
C *Dº Dº lower Fish trap Fenders.*
D *Dº Dº Dº Needles.*
E *Fish pass consisting of an opening in the Wear-head of 5 feet in width.*
F *Umberleigh Mill.*

end of the last-mentioned island to the right bank, a dam extends in the manner shewn on the plan, which, as the appellant contended, formed with the rest one continuous dam; while on the other hand, the respondent contended, that the dam between the island No. 2, and the right bank, was not a continuation of or necessary part of the dam required for the purposes of the mill, but was a separate and distinct dam by itself.

7. On the right bank the appellant has a side stream, or part of the main stream, which is about fifteen feet wide and 500 feet long, flowing round an island on his side, and in this side-stream, or part of the main stream, the said salmon-hutch or hutches are situated. On the other side of the island, viz., that side which is towards the mid-stream and near the point E on the plan, one end of the mill-dam—according to the respondent's view—begins and extends to the opposite bank, though, as already stated, the appellant's view was, that the mill-dam begins from the right bank at point A as marked on the plan. By means of this dam, the water is penned up and forms a long and angular-shaped pool, and is used to supply the mill on the opposite side, and also a fishing-hutch or trap, in connection with such dam, situated close to the mill-wheel. The legality of the dam thus described, which extends from the mill to the island, marked No. 2, and near to the point E, and of the salmon-hutch on the left bank beside the mill, is not here in question. But the commissioners found as a fact, that the water flowing between the island marked No. 2, and the right bank of the river, was not necessary to, and did not interfere with, the dam on the opposite side of the island marked No. 2, and that the upper part of the island marked No. 2 was 300 yards higher up the river than the mill.

8. The apparatus for catching salmon used and claimed by the appellant is as follows. In that part of the dam which extends from the upper end of the island marked No. 2, to the right bank of the river, is placed a fender, or set of fenders, part of which is stationary or permanent, and the other part moveable. The permanent part consists of a series of wooden bars extending vertically from the top of the water to the bed of the river, and placed close enough to prevent the escape of any but small fish, but sufficiently far apart to allow the stream to pass freely through. The

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moveable part consists of water-tight shutters, which, when closed, completely dam up the water. At a point B further down the side-stream, or part of the river which is between the right bank and the island No. 2, a wooden apparatus is placed, extending quite across from the right bank of the river to the island No. 2. This apparatus is called the Needles, being a framework of wooden spars or rails of a V shape, the apex of the V pointing up the stream, and having a narrow opening of about six inches, sufficient to let salmon pass up through such apex of the V or the eye of the needles. The salmon coming up the river are, by their instinct, induced to face the current, and in doing so they pass up through the needles. Having passed through the needles on their way up stream, the salmon are prevented returning by the difficulty of finding the opening between the needles, and so remain enclosed in a trap or enclosure formed by the needles on the one hand, and the grating placed in the dam behind the fenders on the other hand. The moveable water-tight shutters being then closed, and the flow of water through the grating cut off, the water between the dam or fender and the needles runs or drains away, leaving that part of the bed of the river dry, or sufficiently shallow to enable the fish to be caught without difficulty. A little further down at the points C and D another set of fenders and needles is made, which operate in exactly the same way. These, which are called the lower fenders, were made by cutting through the island No. 2 at the point marked C on the plan, so as to admit water from the bed of the main river into the same side-stream or part of the main river, and the lower needles being situated at a point marked D about ten yards below the lower fenders. The salmon going up to the upper needles and fenders must first pass through the lower needles, there being in fact but one entrance towards both sets of fenders. The lower set of needles thus contribute, as well as the upper set, to facilitate the catching of salmon at the upper fenders, and are capable of being used in connection as well with the upper as with the lower fenders.

9. In proof of the legality of the salmon hutch, or hutches, the appellant tendered the following documents of title:—

I. An indenture under seal, between the two then riparian owners on both sides, dated 1260, whereby the Lady of Umberleigh

granted to the appellant's predecessor, the Lord of Brightleigh, a yearly rent of 2*s.* and liberty to grind his corn at her mill free, in return for her hutched weir at Umberleigh and the easements to be granted at such weir. And she agreed that all fish taken there in weels, hutches, nets, or any other engines, be faithfully divided between them, and she covenanted to repair the hutches in the weir. II. A decree in Chancery, dated 1692, enforcing specific performance of the above agreement as regards the division of the fish. III. An agreement between the two opposite riparian owners of Umberleigh on the one hand, and the Countess of Bath, a riparian owner further down, on the other part, dated 1664, whereby she agreed, subject to qualifications, to remove certain razes, or cattle fences, put up across the bed of the river, which were complained of as preventing the fish going up to their part of the river at Umberleigh, and injuring their profit and ancient privileges there. IV. A quadripartite deed, dated 1720, inter alia demising the capital, messuages, and demesne lands of Brightleigh (*i.e.*, lands adjacent to the appellant's part of the river), and also a several fishery in the river Taw, at a rent of 140*l.* V. A survey made in 1737, and contract by Samuel Rolle, the appellant's predecessor, to purchase the said lands, with the fishery in the river Taw. VI. Several rack-rentals of Brightleigh, between 1747 and 1758, signed by Denys Rolle, mentioning "the fishery" as then let at 6*l.* 16*s.* 6*d.* for a half year's rent. VII. Old accounts of salmon, signed and rendered in 1761, 1762, by the servants of Denys Rolle, stating the produce of such fish "taken in the hutch," and by draughting by certain servants named. VIII. An indenture, dated 1762, whereby Denys Rolle demised the lands adjacent, and the head weir and salmon hutch therein, and also the mill-leat and fishery in the river Taw, and reserving "a right of way to and from the hutch and island near Gribbles Marsh," the place in question. IX. Another indenture, dated 1797, similarly describing the lands, and mentioning "the hutch and island near Gribbles Marsh." X. A lease by Lord Rolle, to one Parkin, of the fishery in the river Taw, dated 1803, containing a covenant "not to taken backward salmon in the hutch." XI. Subsequent leases which mention only "the fishery," without the word "hutch."

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10. It was proved and admitted that the appellant was the present owner of the lands adjoining the river Taw for about a mile, including the place in question to which the above deeds related. There was no evidence to shew when the dam between the upper end of the island marked No. 2, and the right bank, or when the fenders placed in it or the upper set of needles were first erected or placed in the river, or whether the side-stream or part of the river flowing between the right bank and the island No. 2 was artificial, or partly artificial.

11. It was proved by aged witnesses who lived near the spot, that the hutches or apparatus in its present state, consisting of the dam, upper and lower fenders, and upper and lower sets of needles, had been fished by the appellant and his predecessors for the last sixty years, including the year 1861; and it was also proved by two witnesses, aged eighty-six and seventy-six, that when they were boys there were only the upper set of fenders and needles, and that the lower fenders and needles had been added about seventy years ago, and since these two witnesses recollected the place, and that the number of upper fenders or shutters was six, whereas now there are only three. On a view of the site of the upper fenders the state of the ground confirmed this account, and the mark of the place where some additional upper fenders stood is still visible. It was also proved that though the miller during living memory did not complain of the upper fenders being open, he often complained of the lower fenders being open, and when he found the water insufficient for his mill he required the appellant's servant to shut them, which was always done on request, and failing the appellant's servant being near the dam, the miller himself went across the dam and shut those lower fenders, and was never interfered with by the appellant in so doing.

12. At the hearing it was contended by the appellant that the whole of the apparatus in question in its present shape, or, at all events, the dam with the upper fenders and both sets of needles were, under the circumstances, privileged and legal on the ground that there was evidence either of immemorial usage, or evidence from which the existence of a grant or charter might be presumed. He also relied upon the Prescription Act, 2 & 3 Wm. 4, c. 71. It was also contended by him that the whole of his apparatus for

fishing, with the dam composed of the islands and the artificial part of the dam extending across to the mill, constituted one fishing mill-dam, and that within the meaning of the Salmon Fisheries Act, 1861, one fish-pass only was required in such dam. The appellant also contended that, inasmuch as a change having gradually occurred in the depth of that part of the river which is on the right side of the island marked No. 2, the water between the upper fenders and lower needles being shallower than it was formerly, he was entitled to add the lower set of needles as being necessary in connection with the upper fenders to the profitable use and working of the fishery, which could not be used or worked advantageously with the upper set of needles alone. The appellant also contended that the water flowing between the right bank of the river and the island No. 2 was not in fact a side-stream or separate river within the meaning of the Salmon Fishery Act, 1865, but that such water must be treated as part of the main river.

13. It was contended, on the other hand, by the respondent, that this hutch, or the fenders in combination with the needles, constituted a fishing-weir within the meaning of the Salmon Fishery Acts, and, if so, then whether it was an ancient weir or not, it must, in conformity with the 24 & 25 Vict. c. 109, s. 27 (1), have a gap of at least three feet wide always open, so as to give the fish a chance of getting up the river, whereas at present the fenders and needles blocked up the entire side-stream between the right bank and the island No. 2, and prevented any fish going up. That, moreover, as the evidence had established that the lower set of fenders and needles had been added for the first time during living memory, they were illegal and ought to be removed.

(1) Section 27:—"Where any fishing-weir extends more than half-way across any stream at its lowest state of water, it shall have a free gap or opening in accordance with the regulations following, unless otherwise authorized by the Home Office, under the powers of this act; that is to say: (1) The free gap shall be situate in the deepest part of the stream between the points where it is intercepted by the weir. (2) The sides of the gap shall be in a line with, and parallel to the direction of the stream at the weir. (3) The bottom of the gap shall be level with the natural bed of the stream above and below the gap. (4) The width of the gap in its narrowest part shall be not less than one-tenth part of the width of the stream, provided always that such gap shall not be required to be wider than forty feet, and shall not in any case be narrower than three feet."

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14. On the 15th of December, 1866, the commissioners gave a written judgment. They found as facts that the two sets of fenders and needles had been used from the year 1800, or thereabouts, that is to say, more than sixty years before 1861; that the lower fenders and needles had been made and used for the first time about the year 1796, during living memory; that when the hutch was in operation, the needles and fenders barred the passage of fish throughout the whole side-stream, or that part of the river flowing between the island marked No. 2 and the right bank, and that the upper fenders were not in any way connected with, nor did they affect or interfere with the mill-dam and the supply of water to the mill. That such mill-dam commenced only from that side of the island No. 2, near the point marked E on the plan, and extended to the left bank of the river, and was altogether a distinct thing from the dam with the fenders and the needles used by the appellant. They further held that the mode of fishing in the appellant's side-stream or part of the main stream was by means of the fenders and needles, the fenders being used to dam up the water, so that when they were removed and the currents flowed through the grating, the fish were drawn up through the needles into a trap or inclosure, and that therefore the whole constituted together a fishing-weir within the meaning of the Salmon Fishery Acts, the fenders and grating being the weir, and the needles part of the inclosure annexed to and part of such weir, and that the side-stream or part of the main river for the purpose of fishing was to be dealt with as a separate river.

15. They held in point of law that the statute of 12 Edw. 4, c. 7, extended to non-navigable rivers, which salmon frequent, and that that statute prohibited riparian owners, even in their private waters, doing any of the things there specified, videlicet, making, levying, enhancing, straiting, or enlarging weirs, fish-garths, hecks, or floodgates, and divers other disturbances. That this set of fenders and needles came within the description of things prohibited by the statute henceforth. That the Prescription Act did not apply to rights which, during all the period of their user, had been prohibited by statute as illegal; that, therefore, in order to prove the legality of the fenders and needles, the appellant was

bound to produce evidence from which they might reasonably conclude that these had existed and been used before the statute 12 Edw. 4, and if it could be shewn that they were either made and used for the first time in whole or part since that date, they were in whole or in part illegal. That, taking the documentary evidence along with the modern user proved, they might reasonably infer and did infer that the appellant's predecessors had had a set of fenders and a hutch since the time of Edward IV., but that the documents and evidences of witnesses proved that only one set of fenders and needles had existed so long, and that the other or lower set were made since that date, and therefore were illegal. They therefore made their order that the lower set of fenders must be shut up permanently; and the lower set of needles be abated and removed; and that the upper fenders and needles, as being a fishing-weir, must be altered so as to comply with the 27th section of the Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, videlicet, by making a permanent opening in the fenders and in the needles of three feet wide, from the bottom to the top, the total width between the island and the right bank being fifteen feet.

The questions for the Court were:—

1. Whether, upon the facts found as above stated, the decision of the comissioners, that the dam and fenders extending from the island marked No. 2, to the right bank of the river, do not form part of a fishing mill-dam, is correct in point of law.

2. Whether their decision directing a permanent free gap in the dam and fenders is correct in point of law.

3. Whether their decision, that the lower set of needles is illegal, and directing their removal, is correct in point of law.

4. Whether their decision, that the lower set of fenders is illegal, and directing their permanent blocking up, is correct in point of law.

Nov. 13, 1867. *Sir J. B. Karslake, A. G.* (*Hannen* with him), for the respondent.

Nov. 20. *Archibald* (*H. Cowie* with him), for the appellant.

The arguments are fully noticed in the judgment of the Court.

In addition to the cases noticed in the judgment, the following

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cases were cited: *Thomas* v. *Jones* (1); *Williams* v. *Wilcox* (2); *Fisher* v. *Prowse* (3); *Eaton* v. *Swansea Works.* (4)

Cur. adv. vult.

Jan. 30, 1868. The judgment of the Court (Cockburn, C.J., and Lush, J.) was delivered by

COCKBURN, C.J. This is a case stated by commissioners under the Salmon Fishery Acts, for the purpose of taking the opinion of this Court on the validity of two orders made by the commissioners, whereby the appellant, the Hon. Mark Rolle, was directed, first, to remove a part of a fishing-weir maintained by him in the river Taw, in the county of Devon, and, secondly, to make a free gap of not less than three feet in the residue of the said fishing-weir.

The appellant, the Hon. Mark Rolle, is the owner of land lying on the right bank of the river Taw. The river runs from south to north, and is not navigable at the part in question. Opposite to the appellant's lands there are, on his side, at a distance of about fifteen feet from the shore, two small islands, belonging to the appellant, separated from each other by a narrow interval. At the southern or uppermost extremity of the two islands there has been from time immemorial between the island and the main land, a fender or hutch, and lower down the stream certain wooden needles, shaped in the form of a V, with an opening in the lower end, such lower end being placed up the stream, through which salmon on their passage up the river made their way, and being unable to return, became enclosed between the fender and the needles; and on the water being shut off by the fender they are easily taken. This apparatus for taking the fish constitutes, beyond all dispute, a fishing-weir within the meaning of the recent acts.

About sixty or seventy years ago, at which period the two islands, as now existing, formed only one, an alteration was made by the predecessor of the appellant of the following nature. An opening was made towards the lower part of the island, so that

(1) 5 B. & S. 916; 34 L. J. (M.C.) 45.

(2) 8 A. & E. 314.

(3) 2 B. & S. 770; 31 L. J. (Q.B.) 212.

(4) 17 Q. B. 267; 20 L. J. (Q.B.) 482.

what before had been one island was converted into two, and a portion of the stream on its downward course was enabled to flow through the opening, and to pass between the lower island and the right bank of the stream. At this opening a fender or hutch was placed, which, like the old one, enabled the owner of the island to command the flow of the water. The needles were then removed from their original position to a spot lower down the stream, between the second island and the main land. The effect of this alteration was not only to enlarge the area of the old weir, but also to constitute a much more efficient one than had previously existed. The increased volume and rush of the water, owing to the admission of part of the stream at the opening between the now divided islands, being calculated to attract the fish, and induce them to pass between the land on the appellant's side and the islands in their way up stream. It appeared that the use of the weir thus enlarged and improved had not, so far as its use as a fishing weir was concerned, been interfered with by riparian owners on either side of the river; but the use of the fender at the opening between the islands had been at times interrupted by the occupiers of a mill, situate on the opposite bank, somewhat lower down the stream, called the Umberleigh Mill.

It appears that from the north western extremity of the lowermost of what are now the two islands there has been from time immemorial a dam extending diagonally across the stream to the mill in question, the effect of which dam operating in conjunction with the island was to turn the body of the water to the mill. The effect of the newly made opening being to let a portion of water escape which must otherwise have gone to supply the mill, and this diminution of the water being sufficient when the river was low to interfere with the working of the mill, the miller was accustomed at such times to insist on the new fender being put down, which was done, or if none of the appellant's people were at hand, the miller went across the dam to the island and put down the fender himself, a proceeding which was always acquiesced in.

Upon this state of facts the commissioners have made two orders. Holding the old weir to be legal, as having existed prior to the time of Edward I., they have contented themselves with ordering

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a fish-gap to be made in it, according to the provisions of ss. 12 and 27 of the Act of 1861 (24 & 25 Vict. c. 109), but they have held the more recent part of the existing weir to be illegal, and have therefore ordered its removal altogether. We will deal with the latter part of the order in the first instance.

The order for the removal of the new weir is based by the commissioners on the assumption that even if the Magna Charta and the succeeding statutes down to Edward IV. were confined to navigable rivers, yet that the latter statute had a more extensive effect, and that no easement of a fishing weir can have been legally acquired since the date of that statute by a riparian owner in a non-navigable river. We are of opinion that the commissioners are herein wrong, and that the Act of 12 Edw. 4, as well as the statutes which preceded it on the subject of weirs, relate to navigable rivers only. It is true that in Magna Charta, kidelli or weirs generally, are mentioned as to be put down not only in the Thames and Medway, but also "per totam Angliam nisi per costeram maris;" but the key to this enactment is to be found in the statute of the 25 Edw. 3, st. 4, c. 4, which, after reciting that the common passage of ships and boats in the great rivers of England be often times disturbed by the levying of wears, mills, stanks, stakes, and kiddles, to the great damage of the people, goes on to provide that "all such wears, mills, stanks, stakes, and kiddles, which were levied and set up in the time of King Edward, the King's grandfather, and after till now in *such rivers*" (the words in the Norman French being "in tielx rivers," though these words are omitted in the English version), "whereby the said ships and boats be disturbed, shall be put out and utterly pulled down without being renewed."

And again, the statute of the 45th of the same king, confirming the foregoing statute with the addition of a penalty on those who should infringe it, refers to the disturbing of the passage of ships and boats in the "*great rivers*," and to the weirs, mills, &c., levied and set up "*in such rivers*." The next statute is that of the 1 Hen. 4, c. 12, which, after reciting the statutes of the 25th and 45th of Edw. 3, further recites the petition of the commons, shewing that "the common passages of ships and boats *in the great rivers* of England, and also meadows, and pastures, and lands sowed adjoining to the *said rivers* be greatly disturbed,

drowned, wasted and destroyed by outrageous enhancing and straitning of wears, mills, stanks, stakes, and kidels, in old time, made and levied before the time of King Edward, son of King Henry, whereof great damages and losses hath come to the people of this realm, and daily will come if remedy be not thereof provided;" then goes on to enact that "the said statutes be in all their articles holden and firmly kept and duly executed, with all the pains and after the effect of the same," with a further provision that commissions shall issue "to survey and keep the waters and great rivers, and to correct and amend the defaults, and to make due execution of the said statutes;" and the commissioners are further to survey the old wears, &c., made before the time of King Edward, and if such weirs or other things have been "too much enhanced or straitned," they are to correct, pull down, and amend them in respect of the excess, reserving, however, the reasonable substance thereof in old times accustomed; and if the owner of the freehold shall not pull down and amend, when adjudged so to do, within six months, or shall thereafter enhance or increase them against the judgment of the commissioners, he is to incur a fine of a hundred marks to the king.

Next follows the statute of the 4 Hen. 4, c. 11, the preamble of which recites, "that by wears, stakes, and kidels, being in the water of Thames and of other 'great rivers' through the realm, the common passage of ships and boats is disturbed, and much people perished, and also the young fry of fish destroyed, and against reason wasted and given to swine to eat, contrary to the pleasure of God, and to the great damage of the king and his people," goes on to provide that "the statutes thereof shall be holden and kept and put in due execution," and that commissions shall be awarded to justices and others, to "inquire of all that which is contained in the said statutes, and to punish the offenders of the same by fine according to their discretion."

In this latter statute, reference is made to a purpose beyond what was referred to in the former statute, namely, the protection of the young fry of fish; but the mention of "great rivers" in the preamble, and the direct reference to the prior statutes, show that the statute was intended to apply only to weirs erected in navigable rivers, and from which obstruction to navigation occurred,

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although the incidental injury to the fish is thrown in as an additional reason for enforcing the law.

Then comes the statute, 12 Edw. 4, c. 7, the preamble of which begins by reciting as follows:—"Whereas, by the laudable statute of Magna Charta, among other things it is contained that all kiddels by Thamise and Medway, and throughout the realm of England, should be taken away, saving by the sea banks, which statute was made for the great wealth of all this land, in avoiding the straitness of all rivers, so that ships and boats might have in them their large and free passage, and also in safeguard of all the fry of fish spawned within the same." It then goes on to recite at length the statute of 1 Hen. 4, c. 12, after which it proceeds as follows:—"Contrary to which great charter, and all the statutes aforesaid in divers parts of this realm of England, both in the destroying of the fish, as afore is said, and in the disturbance of the passage of ships, barges, boats, and other vessels by divers and many people, divers fish-garths, mills, mill-dams, mill-stanks, locks, ebbing-wears, stakes, kedels, hecks, and flood-gates and divers other disturbances be daily enhanced, levied and enlarged, to the great damage of our lord the king, and of his faithful lieges." The statute then proceeds to enact that "the statute of the great charter, and all other statutes concerning the premises shall be duly observed and kept," with penalties on those who, within a specified time, shall not obey the award or judgment of the commissioners as to pulling down or amending of any of the wears or other disturbances specified.

Callis, a great authority on these matters, in his Work on Sewers (p. 259), expresses a decided opinion that the operation of these statutes is confined to navigable rivers. "In my opinion," he says, "all the aforesaid statutes did extend only to navigable streams and rivers with ships and boats." In this opinion we entirely concur. The provision of Magna Charta is, it is true, general in its terms, and primâ facie would apply to all rivers; but, as Callis observes (p. 258), "the generality of the statute of Magna Charta is restrained by the succeeding statutes."

The statutes of Edward 3, as well as the first statute of Henry 4, refer expressly to the "great rivers," and to the obstruction to the navigation as the sole ground of putting down weirs. It is not till the second statute of Henry 4 that any reference is made to

the protection of the fish, but this is spoken of only with reference to the "great rivers;" for this statute, like the later one of Edward 4, expressly refers to the great rivers, and both statutes are professedly passed to enforce the performance of the former statutes.

It is further to be observed, as confirming the view that these acts are all confined to navigable rivers, that obstructions are prohibited which, except in navigable rivers, could be of no public detriment. Mills, for instance, which are forbidden as interfering with the passage of vessels, would, if established on non-navigable rivers,—though they might encroach on the rights of riparian owners,—far from being a public evil, be of benefit to the rest of the neighbourhood. Again, as regards the fish, inasmuch as the public generally have a right to fish in navigable rivers, the destruction of the fry by means of weirs in such rivers was matter of public concern, and became a fit subject of imperial legislation; but, as in other rivers, the riparian owners were alone entitled to take the fish, and, as appears by the case of *Weld* v. *Hornby* (1), could prevent any interference with the general rights of the riparian proprietors by action, there was no necessity, in the case of such rivers, for statutory protection. The idea of prohibiting an easement which might otherwise be lawfully acquired, and thus to interfere with private rights, in order to secure to the public a larger supply of an article of food, does not appear to have occurred to our earlier legislators.

But the very enactment we are called upon to interpret seems to set the matter at rest. If the early statutes prohibited weirs in non-navigable as well as in navigable rivers, the only question as to the former, as well as the latter, would be whether they existed before the time of Edward I. But the present statute makes a special reservation in favour of weirs lawfully existing by grant or charter, as well as by immemorial user. Now, though length of enjoyment affords legitimate evidence of grant, enjoyment under a grant requires no length of time to give it validity. If, therefore, the legislature had considered that weirs in non-navigable rivers were illegal under the old statutes, they would not have made a reservation in favour of weirs existing by charter or grant at all; or at all events would have amended the condition that the charter

(1) 7 East, 195.

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or grant should have been anterior to the time of Edward I. But in that case there would have been no necessity for the reservation in question; for it has been held, as far back as the case of the *Chester Mill* (1), that the effect of the 25 Edw. 3 is to legalize all weirs which existed before the time of Edward I.

For these reasons it seems to us clear that, though weirs in navigable rivers are illegal, unless they existed before the time of Edward I., such an easement may be acquired in private waters by grant from other riparian owners, or by enjoyment; in short, by any means by which such rights may be constituted.

The ground on which the commissioners have based their order thus failing, we have next to consider the other grounds on which, on the argument before us, it was contended that the right of the appellant to have the weir in its modern shape failed.

In the first place it was urged that, as there was no pretence for saying that there had been any grant from the other riparian owners, and the appellant's right to the weir as an easement must therefore rest on enjoyment alone, so as to bring it within the time required by the 2 & 3 Wm. 4, c. 71, the interruption to the use of the weir by the acts of the occupier of the Umberleigh Mill, in causing the fender between the two islands to be shut down must be fatal to the appellant's right. We, however, think that there is nothing to prevent a second easement being acquired as subordinate to one already existing where the subject-matter admits of it. If the other riparian owners on the stream had granted to the appellant to have a weir for the purpose of taking fish at such times as the whole body of the stream was not needed for the working of the mill, such a grant would have been perfectly good, and would have conferred an easement pro tanto: we see no reason why such a qualified easement should not be acquired by user for the time required to confer easements in respect of water.

The remaining objection is that the weir as it now exists is not within the reservation in s. 12 of the Act of 1861 (24 & 25 Vict. c. 109), as it is not used under any grant or charter, nor has it existed from time immemorial.

It must be admitted that the case is not within the words of the reservation, if strictly taken; but the question is, whether we may

(1) 10 Rep. 137 b.

not give a wider construction to the language used. It is impossible to suppose that the legislature intended to make a distinction between an easement acquired by grant and one acquired by length of enjoyment. Under the old law a jury would have been told to presume a grant from a user of sixty years. The Prescription Acts have substituted fixed periods of enjoyments for the fiction of lost grants. The legislature cannot have intended to place an easement established by long user on a different footing from one acquired by grant, more especially as any such easement acquired by grant, however recent, is protected by the statute. The intention must have been to preserve existing rights, however acquired, and though the words used may be inartificial, yet if by a liberal construction of the language used, we can give effect to such intention, we think we ought to do so.

We are therefore of opinion that the order of the commissioners for the removal of the newer portion of the weir cannot be sustained.

We have, lastly, to consider that part of the order of the commissioners which relates to the free gap which they have directed to be made in the weir.

We agree with the commissioners in thinking that the mill-dam extending from the lower of the two islands to the Umberleigh Mill forms no part of the appellant's weir, which consists of the fender and needles, and is quite independent of the dam. The fish-pass ordered by the commissioners to be made in the dam as a fishing mill-dam can in no way affect the obligation of the appellant to make a free gap in his weir. But the question whether the commissioners have authority to order such a free gap to be made is one of no small difficulty.

Section 12 of the Act of 1861 (24 & 25 Vict. c. 109), while it makes a reservation in favour of weirs lawfully existing at the passing of the statute, annexes a condition, "that no fishing weir, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon, unless it have therein such free gap *as is hereinafter* mentioned." The subsequent provision as to the free gap required is to be found in s. 27 of the act. And it is not a little remarkable that, on turning to that section, we find that it relates expressly and entirely to weirs extending more than half way

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across a stream at its lowest state of water, making no provision whatever for weirs of lesser dimensions.

If, indeed, we could treat the water flowing between the islands and the appellant's land as a stream in the sense of the act, the difficulty would not present itself, as the weir extends across the whole of this part of the stream. But we think we cannot so hold under the circumstances of this case.

It was urged before us, on the part of the respondent, that unless the word "stream" in s. 27 were held to apply to the part of a stream running between an island and the mainland, the result would be that where a river was divided by an island into two branches, if there were two weirs each extending from the island to the mainland, the whole river would be blocked up; and such, indeed, would be the effect here, in consequence of the mill-dam of the opposite proprietor extending across the stream from the other side of the island. This, however, is an accident, and such instances are likely to be of rare occurrence, and can hardly have been in contemplation of the legislature; while, on the other hand, it is to be observed that if every such part of a stream were to be considered as within s. 27, it would follow that in every instance in which such part of a stream is only a few feet in width—as the minimum size of the gap is fixed at three feet—the practical use of such a weir would be destroyed, which would be contrary to the intention of the legislature to preserve existing rights. We are far from saying that where a river divides itself into two branches, and afterwards reunites, each of such branches may not constitute a stream within the meaning of the act. Section 32 of the Act of 1865 (28 & 29 Vict. c. 121), which relates to the alteration of existing weirs by order of the Secretary of State on the application of the commissioners, contains, indeed, an express provision that, "for the purposes of this section, where a river is divided into separate branches, each branch shall be considered as a separate river." The assumed necessity for such an enactment, however, rather tends to shew that the language of the prior statute did not admit of such a construction. But assuming that a branch of a river may be treated as a river or stream, the question whether water flowing between an island and the bank of a river can be said to be a branch must depend on the circumstances of

each particular case. In the present instance the river, we are informed, is 160 feet wide, while the width of the part in question does not exceed fifteen feet. We do not think that this narrow passage can be treated as a branch of the river.

It was further urged for the respondent that the use of the word "stream" in s. 27 instead of the term "river," which occurs in the other sections of the act, was intended to meet such a case as the present, as a narrow portion of a river, though it cannot properly be termed a river, may still be termed a stream. Assuming that there is any foundation for this distinction, yet in s. 28, which must be read with s. 27, the term "river" is again adopted; whence it appears that the word "stream" in s. 27 was used as synonymous with "river." We can therefore attach no importance to the use of the word "stream" as distinguished from "river."

We are therefore under the necessity of endeavouring to reconcile the inconsistent provisions of ss. 12 and 27 of the act, and the difficulty is undoubtedly very great. The first of these sections prohibits positively the use of any weir unless the subsequent provisions as to free gaps shall be complied with. The subsequent provisions as to free gaps have no application to weirs not extending beyond the middle of the stream. Section 28, which provides that where a fishing-weir is without a legal free gap at the time of the commencement of the act, the owner of the weir shall make one within twelve months under a penalty, affords no assistance, as the legal free gap thus referred to must be taken to be a free gap required by the act, no such gap being necessary at law, or otherwise than by the operation of the act.

This being so, how can we best reconcile these inconsistent enactments? It may, no doubt, be inferred from the generality of the enactment of s. 12 that it was intended by the legislature that in every weir still permitted to exist there should be a free gap for the passage of the fish; but, unfortunately, while the act has specified what will be a sufficient free gap in the case of weirs extending more than half across a stream, it has wholly omitted to give any directions as to what free gaps are to be made in weirs of smaller size. On the other hand, we cannot suppose that the legislature intended to place weirs not extending beyond the half of the stream in a worse position than weirs of still larger dimen-

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sions. But to hold that the appellant could not maintain his weir without having a free gap conformable to the provisions applicable to it, would have the effect of destroying the appellant's right altogether, which we think cannot have been intended. In this difficulty we think the only course open to us is to hold that the enactment of s. 12, annexing the condition of having a free gap to the continuance of existing weirs, though general in its terms, is applicable only to such weirs as come within s. 27. If this conclusion should be inconsistent with the legislative intention, we must leave it to parliament to amend the statute.

It follows that the order of the commissioners as to the free gap cannot be upheld.

Judgment for the appellant.

Attorneys for appellant: *Frere, Cholmeley, & Forster.*
Attorneys for respondent: *The Solicitors to the Treasury.*

Feb. 4.

MARTIN'S PATENT ANCHOR COMPANY, LIMITED, *v.* MORTON. THE SAME *v.* HEWETT.

Company, Shareholder in—Liability of Bankrupt Shareholder to pay subsequent Calls—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 75—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 154.

A shareholder in a company under the Companies Act, 1862, who has become bankrupt and received his discharge, but retains his shares, is not discharged from liability to pay subsequent calls, whether made while the company is in operation or when it is being wound up: for the covenant of the shareholder on becoming a member under s. 16 to pay the calls on his shares is not "a contract to pay sums of money yearly, or otherwise," within s. 154 of the Bankruptcy Act, 1861, so as to make the present value of their liability proveable under that section; and s. 75 of the Companies Act, 1862, which makes it "lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls," only applies where the bankruptcy of the contributory is contemporaneous with the winding up of the company.

MORTON'S CASE.

DECLARATION that the plaintiffs' company is a company registered and incorporated under the Companies Act, 1862, that the defendant was and is the holder of fifty shares in the capital stock of the company, and was and is on the register of shareholders

registered as such shareholder, and has enjoyed and continues to enjoy all the advantages therefrom accruing in the government of the company and otherwise, and is indebted to the plaintiffs in 228*l.* for certain calls upon the said shares, which calls were duly made by the company according to the Companies Act, 1862, upon the defendant as the holder of the said shares in respect of monies unpaid thereon.

Plea: That the defendant became a bankrupt within and according to the statutes in force concerning bankrupts, and that the causes of action accrued before he became such bankrupt.

Issue joined.

At the trial, before Blackburn, J., at the Surrey summer assizes, 1867, it appeared that the plaintiffs' company was registered and incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), with liability limited to the amount unpaid on shares. The articles of association excluded Table A.; but article 13 was in the same terms as article 4, Table A., giving the directors power to make calls in respect of all moneys unpaid on shares.

Fifty shares were allotted to the defendant in 1863, and he paid the deposit upon them. On the 28th of June, 1864, the defendant was adjudged a bankrupt, and obtained his order of discharge on the 28th of October, 1864. The defendant continued to hold the shares. On the 5th of July, 1864, and again on the 16th of April, 1866, a call of 1*l.* per share was made. In March, 1867, an order was made for the voluntary winding-up of the company, and on the 18th of April, 1867, another call of 1*l.* was made by the liquidator; and he sued the defendant for the amount due in respect of the three calls on the fifty shares.

The learned judge directed a nonsuit, with leave to move to enter a verdict for the plaintiffs for 150*l.*, the amount of the three calls, on the ground that the defendant's bankruptcy did not discharge him from liability to pay calls subsequently made.

HEWETT'S CASE.

This was a similar action, tried at the same assizes. The defendant was the holder of fifty shares; and had been adjudged a bankrupt in July, 1866, and received his certificate at

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the latter end of that year; but he continued to hold the shares.

In this case also a nonsuit was entered, with leave to the plaintiffs to move to enter a verdict for 50*l.*, the amount of the call made on the 18th of April, 1867, on the ground that the defendant was not discharged by reason of his bankruptcy from liability to pay this call.

Rules having been obtained accordingly, the two cases were argued together.

J. Brown, Q.C., shewed cause on behalf of the defendant Morton. The defendant is discharged on his bankruptcy from all liability to pay subsequent calls as a shareholder in the company. It must be conceded that under the former Bankruptcy Acts, 6 Geo. 4, c. 16, ss. 51, 56, and 12 & 13 Vict. c. 106, s. 178, the cases have decided that calls are not proveable either as a debt payable in futuro or as a debt due upon a contingency: *South Staffordshire Railway Company* v. *Burnside* (1), *General Discount Company* v. *Stokes*. (2) But the intention of the Bankruptcy Act of 1861 (24 & 25 Vict. c. 134), was to clear the bankrupt from all future liabilities on contracts existing at the time of his bankruptcy; and ss. 150—154 are larger in their terms than the corresponding sections of the former act. Sections 150—153 do not apply to the present case; they shew, however, the general intention of the legislature. But s. 154 meets the case of liability to pay future calls. It enacts, "If any bankrupt shall at the time of adjudication be liable by reason of any contract or promise to pay premiums upon any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay to or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise, may, if he thinks fit, apply to the Court to set a value upon his interest under such contract or promise, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

[LUSH, J. That section was aimed at the decision of the Exche-

(1) 5 Ex. 129; 20 L. J. (Ex.) 120.
(2) 17 C. B. (N. S.) 765; 34 L. J. (C.P.) 25.

quer Chamber in *Warburgh* v. *Tucker* (1), that the bankrupt was not discharged from his liability on a covenant to pay premiums of insurance.]

No doubt; but the words are quite large enough to include the liability to pay future calls. By s. 16 of the Companies Act, 1862 (25 & 26 Vict. c. 89), the articles of association "when registered shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, &c., to conform to all the regulations contained in such articles; and all moneys payable by any member to the company in pursuance of any of such conditions and regulations shall be deemed a debt due from the member to the company." Upon becoming a shareholder or member therefore, the defendant covenanted to pay all calls which should be made on his shares, and he was therefore under a contract to pay sums of money not yearly but "otherwise," that is at such time as the directors may appoint, within s. 154. But assuming the case not to be within s. 154, the liability to the call under the winding-up order is discharged, by reason of the enactments in the Companies Act, 1862. In the matter of *The Royal Bank of Australia* (2), Erle, J., sitting with Stuart, V. C., decided that the liability to pay calls in a company was not a specialty debt; but by s. 18 of the act of 1862, the members of a registered company become incorporated, "but with such liability on the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned." By s. 38 (subs. 4) in the event of a company limited by shares being wound up, the limit of the contribution of each member is the amount unpaid on his shares. Then, in part iv., relating to the winding-up of a company, s. 75 enacts: "The liability of any person to contribute to the assets of a company under this act in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty), accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for

(1) E. B. & E. 914; 28 L. J. (Q.B.) 56.
(2) 3 Sm. & G. at p. 276; 26 L. J. (Ch.) 96, n.

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enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made." In *Ex parte Harding* and *Ex parte Canwell* (1) Lord Westbury, C., while holding in the first case that a call in general is not a debt till made, in the second case held that under s. 75, the liability related back to the date of the contract, that is to the time the shareholder subscribed the deed or became a member; and in *Williams* v. *Harding* (2), Lord Kingsdown, while agreeing as to the first point, goes out of his way to observe: "The Companies Act of 1862 has removed all doubt about subsequent cases, by expressly declaring that the call shall constitute a debt as from the time when the liability was contracted;" and he adds, "It may be observed, that it declares that the call shall constitute a specialty debt."

[LUSH, J. Part iv. in which s. 75 occurs, only relates to the winding-up of a company; the bankruptcy must surely be pending during the winding-up.]

Section 77 applies to the case of a bankruptcy *before* the contributory has been put on the list. It is submitted, therefore, first: that the very large and general words of s. 16 of the Companies Act, 1862, takes the case out of the decision of the *South Staffordshire Railway Company* v. *Burnside* (3), or at all events brings the case within the enactment of s. 154 of the Bankruptcy Act, 1861; secondly, that s. 75 discharged the bankrupt at least from the last call.

M. Chambers, Q.C., for the defendant Hewett, contended that the defendant was discharged, under s. 161 of the Bankruptcy Act, 1861, by his order of discharge from the liability to the call under the winding-up order, inasmuch as ss. 175, 177 of the Companies Act, 1862, clearly applied to the case of a contributory who becomes bankrupt either before or after he is put on the list, and s. 75 made the liability to calls a debt proveable under the bankruptcy.

Philbrick appeared in support of the rule in each case, but was not heard.

(1) 33 L. J. (Bkr.) at pp. 30, 32. (2) Law Rep. 1 H. L. at p. 29.
(3) 5 Ex. 129; 20 L. J. (Ex.) 120.

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BLACKBURN, J. The question is common to both cases, whether a bankrupt, who, having been a shareholder in a company incorporated under the act of 1862, after his bankruptcy, and after he has received his discharge and become sui juris, still continues to be a shareholder, is, on the company being wound up, discharged, by his former bankruptcy, from liability to pay calls made under the winding-up. This point turns on the fourth part of the statute 25 & 26 Vict. c. 89, and on the construction of ss. 75, 76, and 77; reliance being chiefly placed by the defendants' counsel on s. 75. [The learned judge read s. 75.] The question, then, is, when does the liability of a contributory commence? The case cited from the House of Lords does not touch the present point. The following sections, ss. 76 and 77, shew that s. 75 refers to the bankruptcy still pending when the winding-up takes place, while the assignees have still assets, and in such a case the company may prove for the estimated amount of the bankrupt's liability to future calls. Section 77 places the assignees in the position of the bankrupt as a contributory, for they are to be "deemed to represent the bankrupt for all purposes of the winding-up," which could not be the case when the bankruptcy had taken place years before; and therefore, as it seems to me, s. 75 does not apply to the present cases, where the shareholders had been adjudged bankrupt and discharged before the winding-up commenced. It would be a monstrous injustice that, when a man remains a shareholder, the assignees not taking his shares, he should yet be allowed to get rid of his liability to pay calls, on the ground that he had been a bankrupt several years before.

Then comes the question, whether there is anything in the Bankruptcy Act, 1861, that makes a prior bankruptcy a discharge from liability as to future calls. Mr. Brown said that s. 16 of the Companies Act, 1862, put each shareholder or member in precisely the same position as if he had put his seal to a deed containing a covenant that he would pay each call when made; and, so far, I agree with him; but he went on to argue that the calls became, therefore, a debt due to the company, from which the shareholder would be discharged by a bankruptcy long prior to the time when the calls were made, although he still remained a shareholder and entitled to all the advantages to be derived from holding

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the shares. I think the mere statement of the proposition is sufficient to make one say that, if the legislature have used language capable of expressing such an intention, they have said what they never could have intended. But I find no ground for such a proposition in the language of the legislature. As far as the Bankruptcy Act of 1849 is concerned, the question is admittedly precluded by the authority of decided cases; but then s. 154 of the act of 1861 is relied on. [The learned judge read the section.] Mr. Brown says the bankrupt has covenanted "to pay a sum of money yearly, or otherwise," inasmuch as he covenanted to pay such sum as may become due from him as calls. But that section clearly contemplated only a contract to make periodical payments ascertained at the time of the contract, and the liability to pay calls, if made, can never be said to be a contract to pay sums, yearly or otherwise, analogous to the premiums on a policy of insurance. The legislature, therefore, appear to me not to have said that the present value of the calls shall always be ascertained in the event of the bankruptcy of a shareholder in a company, indeed it would be impossible to do it, as the amount and period at which they are to be paid would be uncertain; and if so, the legislature have not said what Mr. Brown contends they have, that the bankrupt shall be discharged from his liability to pay future calls. It might be judicious to say in the articles of association that, when a shareholder becomes bankrupt, and the assignees refuse to take to the shares, there should be power in the company to sell or take the shares, or the legislature might have said so; but as it is, the bankrupt shareholder, if he retains his shares, remains liable for future calls.

MELLOR, J., concurred.

LUSH, J. I am of the same opinion. The construction sought to be put by the defendants' counsel on ss. 75 and 77 of the Companies Act, 1862, cannot be maintained. On the other hand, it might be said that the sections refer only to the case of a bankruptcy taking place after the winding-up has commenced; but that would be too narrow a construction; the sections seem to me to refer to the concurrency of the two proceedings, the bankruptcy

of the shareholder and the winding-up of the company. The first part of s. 75 applies to all shareholders, and says that the liability as a contributory shall be deemed a debt accruing due when he first becomes a contributory, but not payable till the calls are made. The section then goes on to say what is to be done in the case of the bankruptcy of a contributory. The argument of the defendants requires the language of the section to be altered, or at any rate to be read as if it said: It shall be lawful in the case of any contributory "who has at any time been bankrupt and obtained his discharge," to prove against his estate the estimated value of his liability to future calls. But such a provision would be perfectly absurd; how could there be any proof against an estate already administered, and against a man who has become sui juris? Then, as to the defence attempted to be raised by s. 154 of the Bankruptcy Act, 1861; that section does not apply to any such case as this. No doubt, by force of s. 16 of the Companies Act, 1862, the members of a company are in the same position as if they had covenanted to pay any call which may be made while they remain members. It has been decided that there is nothing in the Bankruptcy Act of 1849 extending to such a case; and, as it seems to me, s. 154 of the act of 1861 does not apply to any such contract or covenant to pay uncertain sums like this liability to pay calls, but is confined to cases where the bankrupt is under a liability to make certain periodical payments, such as premiums of insurance, and the like.

Rule absolute in each case.

Attorney for plaintiffs: *F. W. Denny.*
Attorneys for *Morton: Lewis & Lewis.*
Attorney for *Hewett: J. R. Chidley.*

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

EASTER TERM, XXXI VICTORIA.

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April 17.

ENGEL *v.* FITCH AND OTHERS.

Vendor and Purchaser—Sale of Real Estate—Measure of Damages for Breach of Contract.

The defendants, mortgagees of the lease of a house, sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The plaintiff re-sold at an advance of 105*l.* to G., who wanted the house for occupation. On investigation, the title was satisfactory, but, on the plaintiff requiring possession before completing the purchase, it appeared that the mortgagor was in possession and refused to give it up. The defendants were in a position to oust him by ejectment, but they refused to complete the sale on the ground of expense. On this the plaintiff brought an action on the contract of sale:—

Held, that as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to their contract, the plaintiff could recover, not only the deposit and the expenses of investigating the title, but also damages for the loss of his bargain; and that the measure of damages was the profit which it was shewn he could have made on a re-sale.

Flureau v. *Thornhill* (2 W. Bl. 1078), and the subsequent cases discussed.

FIRST count, that the defendants on the 7th of November, 1865, caused to be put up for sale by public auction, the leasehold of

two houses, Nos. 48 and 49, Great Sutton Street, Clerkenwell, subject amongst others, to the following particulars and conditions of sale: that the purchaser should pay a deposit of 10 per cent. on the purchase-money immediately after the sale, and the remainder on the 26th of December, 1865, on which day the purchase should be completed; and that possession of the house No. 48 should be given by the defendants on the completion of the purchase; and that on payment of the purchase-money the defendants should execute a proper assignment of the premises; that the plaintiff became the purchaser for 195*l.*; that all conditions precedent, &c., have happened, but the defendants have refused to perform their agreement: whereby the plaintiff has been deprived of great gains and profits, and has lost the use of the money paid by him as deposit, and of other moneys furnished for the completion of the purchase, and has lost the expenses incurred in investigating the title of the defendants, and preparing to perform the agreement on his part.

Second count, for money had and received, interest, and on an account stated.

The defendants pleaded to the first and second counts payment into court of 20*l.* and 19*l.* 10*s.* respectively.

The plaintiff replied to the first plea, damages ultra, on which issue was joined; and as to the second plea, took the money out of court in satisfaction, &c.

At the trial before Shee, J., at the sittings in Middlesex in Hilary Term, 1867, the following facts and documents were taken as proved.

The defendants were the mortgagees of two leasehold houses, under a deed of the 1st of August, 1862, by which the residue, minus two days, of the term of twenty-one years, from the 29th of September, 1859, granted by the Charter House to the mortgagor, was assigned to the defendants, with the usual power of sale; and the defendants put the lease up for sale by auction on the 7th of November, 1865.

The following are the material parts of the particulars and conditions of sale:—

"By order of the mortgagees."

"An unusually eligible short leasehold property.

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"Particulars and conditions of sale.

"Two superior and most substantially built houses and premises. Nos. 48 and 49, Great Sutton Street, Clerkenwell. By Messrs. Tebb, Brothers. On Tuesday, the 7th of November, 1865.

"Particulars.

[After giving the situation and number of rooms, &c.]

	£
"No. 48. Possession will be given on completion of the purchase; rent of the value of (per annum)	100
"No. 49. Is at present let to old-standing weekly tenants, at very inadequate rents, amounting to 32*s.* per week, but would let readily to a yearly tenant, paying taxes, at . . .	90
	190
"Held on lease direct from the Charter House, for twenty-one years, from the 29th of September, 1859, at a ground-rent of . . .	75
Estimated net rental	115

[On the back of the Particulars of Sale.]

"Conditions of Sale.

"2. That the purchaser shall pay down immediately into the hands of the auctioneers, a deposit at the rate of 10*l.* per cent. upon and in part payment of his purchase-money, and shall pay the remainder thereof on or before the 26th of December, 1865.

"4. On payment of the remainder of the purchase-money, the purchaser shall have an assignment of the property, to be prepared at his expense, and shall be entitled to the receipts of the rents and profits from the day of actual completion. If from any cause whatever the purchase is not completed on the 26th of December next, the purchaser shall pay, with the balance of his purchase-money, a proportionate part of the accruing quarter's rent. As the vendors are mortgagees, they will only covenant that they have done no act to incumber.

"5. All objections or requisitions as to the title or conveyance (if any) shall be delivered in writing to Messrs. Lewis & Sons, 7,

Wilmington Square, W.C., the vendors' solicitors, within seven days after the delivery of the abstract, and in default of such delivery, and as to all matters not therein specifically objected to, the title shall be considered as accepted; and every answer to any original or subsequent statement of objections or requisitions, shall, within seven days after the delivery of such answer, be replied to by a statement in writing, delivered as aforesaid, and any such answer not so replied to, shall be considered as satisfactory and final; and in case any objection or requisition shall be so delivered, and the vendor shall be unable or unwilling to comply therewith or remove the same, the vendor is to be at liberty, by notice in writing, under the hand of the vendor's solicitors, to rescind the contract, and on receiving back the abstract, to return the deposit money, without interest, costs, or other compensation, notwithstanding any attempt made to satisfy, remove, or comply with any such objection or requisition, or any negotiation or litigation in reference thereto, or other proceeding consequent on the sale."

The property was put up to auction on the 7th of November, 1865, and the plaintiff became the purchaser for 195*l.*, and paid a deposit of 19*l.* 10*s.*, and a memorandum of purchase was signed by him at the foot of the above particulars and conditions of sale, that the plaintiff was "the purchaser of the property comprised in the within particulars, for 195*l.*, under and subject to the conditions of sale hereunto annexed;" and that he "agreed with the vendors to complete the purchase of the said property in every respect according to the conditions of sale." The auctioneers signed "as agents for the vendors confirming this sale and acknowledging the deposit."

The abstract of title was delivered, and requisitions sent in due course and answered. On the 13th of December, 1865, the plaintiff having in the meantime agreed to sell the property to a Mr. Gilbert for 300*l.*, who wanted No. 48 for occupation, by consent of the defendant's solicitors, further requisitions were sent in by Mr. Gilbert's solicitor, Mr. Richardson, of which the 11th was as follows:—"One of the houses being in possession of Mr. Holdsworth [the mortgagor] possession must be given on completion;" to which the answer of the defendants' solicitors, not sent till the 8th of January, 1866, was, "We cannot give possession of this

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house." In consequence of this, the purchase was not completed by the plaintiff, and a correspondence ensued of which the following letters were read:—

Plaintiff's solicitor to defendant's solicitors. "Jan. 15, 1866.

I have seen Mr. Richardson herein. The only reason the matter is delayed is your not being able to give possession, and as I would not on my client's behalf consent to complete without having possession given to us, as stated in particulars of sale, matters would not be improved by my proceeding on their behalf to carry out the contract. What is the difficulty in ousting the tenant?"

Defendants' solicitors to plaintiff's solicitor. "Feb. 1, 1866.

The purchaser having made an objection which the vendor is unable and unwilling to comply with, the vendors rescind the contract, and the purchaser can obtain back his deposit by application to the auctioneer, Mr. Tebb, at 139, Cheapside."

Plaintiff's solicitor to defendants' solicitors. "Feb. 9, 1866.

Please specify the objection upon which the vendors affect to rescind the contract, and the ground upon which they allege their inability to comply with it."

Defendants' solicitors to plaintiff's solicitor. "Feb. 16, 1866.

The purchaser requires possession to be delivered up. Mr. Holdsworth, the mortgagor, denies the right of the vendors to possession, and the vendors will have to incur considerable expense to obtain the same. The vendors have, therefore, rescinded the contract."

The defendants had commenced an action of ejectment against the mortgagor on the 31st of January, 1866, in which they obtained a verdict on the 24th of April, 1866.

The plaintiff commenced this action on the 16th of March, 1866; and he sought to recover, not only his deposit and the costs of investigating the title, but also 10*l.*, the amount of profit on his re-sale.

It was agreed that the money paid into court was sufficient to cover any claim of the plaintiff, except in respect of the loss of the value of his bargain; and a verdict was taken for the plaintiff for 10*l.* (the advance of price at which the plaintiff had agreed to

re-sell) beyond the money paid into court; with leave to move to enter the verdict for the defendants.

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A rule was obtained, pursuant to the leave, on the ground that the plaintiff was not, under the facts of the case, entitled to recover in respect of the profits of re-sale or goodness of his bargain.

Nov. 4, 1867. *Field, Q.C.* (*Clare* with him), shewed cause. The rule as to damages on a breach of a contract relating to chattels is, that the party sustaining the loss is to be placed in the same situation, as far as damages can place him, as if the contract had been performed. A different rule, no doubt, in general prevails in the case of sales of real estate; but that rule is rather anomalous: per Lord Campbell, C.J., in *Simons* v. *Patchett* (1); viz., that for a breach of contract for the sale of real estate, the damages recoverable are only the expenses which the vendee may be put to in investigating the title: *Flureau* v. *Thornhill* (2); *Walker* v. *Moore* (3); *Pounsett* v. *Fuller*. (4) This rule, however, is limited to cases in which the vendor at the time of sale bonâ fide believes he has a good title, and it turns out on investigation that he is mistaken. If a person, therefore, contract to sell an estate without having obtained a conveyance of it, as in the case of *Hopkins* v. *Grazebrook* (5), or where he knows he has no title, as in *Robinson* v. *Harman* (6), he is not within the rule, and he is liable, not only for the expenses of investigating the title, but for all damages resulting from the breach of the contract. In the present case the plaintiff is entitled to recover the whole damages claimed, for the defendants contracted to sell the premises and give possession on a day certain, and they knew that the mortgagor was in possession; it was the duty of the defendants to have ejected the mortgagor in order to fulfil their contract; and the vendee was ready to complete the purchase, although after the time limited, on possession being given to him, yet the defendants of their own wrong broke the contract.

[He was then stopped by the Court.]

(1) 7 E. & B. at p. 572; 26 L. J. (Q.B.) at p. 199. 3 Jur. N.S. 743.
(2) 2 W. Bl. 1078.
(3) 10 B. & C. 416.
(4) 17 C. B. 660; 25 L. J. (C.P.) 145.
(5) 6 B. & C. 31.
(6) 1 Ex. 850; 18 L. J. (Ex.) 202.

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Jan. 29, 1868. *Hayes, Serjt.*, in support of the rule. Owing to the obstinacy of the mortgagor, the defendants were unable to give possession, and so complete the sale; this is just as much a defect of title as an irremediable defect, and the defendants were therefore entitled to rescind under the 5th condition of sale. But, assuming they had not the power to rescind, or if the rescission was too late, so that the plaintiff is entitled to maintain the action, he can only recover his deposit with interest, and the expenses of investigating the title; and it is admitted that the money paid into court is sufficient for this. The inability to give up possession, as has already been said, is a defect in title; and the case falls within the rule of *Flureau* v. *Thornhill* (1), as affirmed by *Sikes* v. *Wild* (2) in the Exchequer Chamber; there was here no mala fides on part of the defendants; just as in *Sikes* v. *Wild*, the defendant expected that the incumbrancer would act on her promise and transfer her charge to another property, so here the defendants had no reason to suppose the mortgagor would not give up possession.

[LUSH, J. I thought that the distinction had always been kept up between the inability of a vendor to complete and the mere refusal to do so.]

The defendants were unable to complete, time was here the essence of the contract; and the plaintiff so treats it by insisting on possession before completing.

[LUSH, J. The defendants affirmed that they could give possession, and it turns out they cannot.]

But there was no wilful misstatement, as in *Hopkins* v. *Grazebrook* (3); and this distinction has been doubted. In *Walker* v. *Moore* (4), *Bratt* v. *Ellis*, and *Jones* v. *Dyke* (5), the rule in *Flureau* v. *Thornhill* was approved and acted upon. In *Tyrer* v. *King* (6), the defendant's agent sold to the plaintiff what had been already sold to another; and it was held that even in such an extreme case the plaintiff could not recover damages for the loss of his bargain. But assuming the plaintiff to be entitled to damages for the loss of his bargain, the damages can only be nominal; the defendants cannot be taken to have contemplated a

(1) 2 W. Bl. 1078.
(2) 4 B. & S. 421; 32 L. J. (Q.B.) 375.
(3) 6 B. & C. 31.
(4) 10 B. & C. 416.
(5) Sug. V. & P. app. Nos. 5 & 6.
(6) 2 C. & K. 142.

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re-sale to an exceptional purchaser who wanted the house for occupation; and the damages claimed are therefore too remote within the rule in *Hadley* v. *Baxendale.* (1) The general rule as to damages in the breach of a contract of sale of chattels has no application to the sale of land; there is no market price of land as there is in the case of chattels.

[LUSH, J. There is nothing said in *Hadley* v. *Baxendale* (1) about market value. We must take it that the representation that possession could be given was the inducement to the plaintiff to purchase.]

But the failure on the part of the defendants being unexpected brings the case within the rule of *Flureau* v. *Thornhill* (2), and not within the exception of *Hopkins* v. *Grazebrook* (3), where the defendant had sold without any title.

[LUSH, J. The defendants have, in fact, ousted the mortgagor, their conduct is therefore more like a refusal to make a title; it is like the case of a vendor refusing on the ground of expense to get in an outstanding term to complete the title.]

Conceding that: the plaintiff is still not entitled to damages for the accidental goodness of his bargain. Even on the sale of chattels, there is no such rule as would give the purchaser the right to claim the advance of price on a re-sale. On the breach, for instance, of a warranty on the sale of a horse, the measure of damages is the price paid, not any enhanced value of the horse on a re-sale.

[COCKBURN, C.J. According to that argument, the distinction taken in the cases which have been held not to come within the rule in *Flureau* v. *Thornhill* would have been unnecessary.]

Cur. adv. vult.

April 17. The judgment of the Court (Cockburn, C.J., and Lush, J.) (4) was delivered by

COCKBURN, C.J. In this case the facts were as follows:—The defendants had, on the 7th of November, 1865, put up to auction, subject to certain conditions of sale, the lease of two houses mort-

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.
(2) 2 W. Bl. 1078.
(3) 6 B. & C. 31.
(4) Shee, J. was present during the argument, but died before the judgment was prepared.

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gaged to them, as trustees, with a power of sale, which power they had become entitled to exercise. The one, No. 49, was described in the particulars of sale as being let to weekly tenants. As to the other and more valuable property, No. 48, it was stated in the particulars that "possession would be given on the completion of the purchase." The plaintiff being the highest bidder, the lease was knocked down to him for the sum of 195*l.*, and thereupon the deposit required by the conditions was duly paid by him.

The transaction was, by the conditions of sale, to be completed by the 26th of the ensuing December. By the 5th article of the conditions it was stipulated as follows:—[The judgment then set out the fifth condition of sale.]

No difficulty arose as to the title of the defendants, but the mortgagor being in possession of No. 48, refused to give it up, so that the defendants, though fully able to convey, were not in a situation to give possession according to the contract. The plaintiff having in the meantime resold the premises to a Mr. Gilbert, who had bought the house for occupation, at an advance of 105*l.*, Mr. Richardson, the solicitor of the latter, was put into communication with the solicitors of the defendants for inspection of the deeds. Some slight delay having occurred, and a letter having been written by the defendants' solicitors with a view to despatch, the following letter was written by the solicitor of the plaintiff:—[The judgment then set out the four letters already given.]

The defendants having thus refused to perform the contract, the plaintiff brought this action to recover not only his deposit and the expenses of investigating the title, but also the loss of the profit on the re-sale, as well as the expenses which he had incurred in preparing for the sale to his vendee. The defendants have paid into court enough to cover the amount of deposit and interest thereon and the expenses of investigating the title. The question before us is whether the plaintiff is entitled to recover the profit he would have made on the re-sale if the defendants had completed the contract, as also the expenses of preparing the sale to the second vendee.

On the argument before us in support of this claim the general law on the subject of damages for breach of contract was relied on,

the facts of the present case, as it was contended, not bringing it within the rule laid down in *Flureau* v. *Thornhill* (1) and the cases which have followed it, but rather within the exception engrafted on that rule by the decisions in *Hopkins* v. *Grazebrook* (2) and *Robinson* v. *Harman.* (3)

On the part of the defendants it was contended, first, that the defendants, by the objection made by the purchaser to complete on account of the inability of the vendors to give possession, were warranted in giving notice to rescind the contract under the 5th article of the conditions, and having done so, were protected from all liability beyond that of returning the deposit money; secondly, that on the failure to complete a contract for the sale of real estate on account of expense which the vendor finds he would have to incur in order to enable himself to complete the sale, no loss of profit or expense consequent on a re-sale can be recovered by the vendee; thirdly, that such damages are too remote according to the rule established in *Hadley* v. *Baxendale.* (4)

The first of these grounds is easily disposed of. The 5th article of the conditions of sale has reference expressly to title and the instrument of conveyance alone. Such a condition is obviously introduced for the purpose of protecting a vendor against difficulties as to title, which, in the complicated state of the law of real property, often unexpectedly arise, and which a vendor is not always able to remove, at least without considerable expense. Here no question arose as to the title, or as to the form of the conveyance; the purchaser simply declined to complete till the party in possession should have been ousted, so that possession could be given according to the contract. The vendors were not, in our opinion, under such circumstances, entitled to rescind under the 5th article of the conditions.

The other grounds taken by the defendants present more difficulty, and as they involve questions of importance as regards the law of vendors and purchasers, we thought it right to give them our deliberate consideration.

In support of the second ground, the case of *Flureau* v. *Thornhill* (1) and the cases which have followed it were relied on, and

(1) 2 W. Bl. 1078.
(2) 6 B. & C. 31.
(3) 1 Ex. 850; 18 L. J. (Ex.) 202.
(4) 9 Ex. 341; 23 L. J. (Ex.) 179.

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we have to see whether the present case properly falls within the principle of those decisions.

It will be necessary to observe what were the facts in *Flureau* v. *Thornhill*. (1) There the defendants, having sold to the plaintiff a rent issuing out of a leasehold house, and finding himself unable to make out the title, offered the plaintiff either to take the title with all its faults, or to receive back the deposit, with interest and costs. The plaintiff refused to take the title, and brought an action to recover not only the deposit, with interest and costs, but also damages for the loss of his bargain. The defendant having paid into court enough to cover everything but the damages for the loss of the bargain, it was held that the plaintiff was not entitled to recover in respect of the latter.

When the facts of the present case are looked at they will be found to differ from the foregoing in material particulars. The obstacle to the completion of the contract had no reference to title. It was one which the vendors were not unable, but which, on account of the expense, they were unwilling, to remove. They might, had they chosen to incur the expense, have ousted the mortgagor by ejectment, as they, in fact, did after they had put an end to the present contract. Lastly, it was not the purchaser, but the sellers, who repudiated the contract. All that the purchaser said, on being urged to hasten the completion, was that he could not complete till the sellers were in a position to give possession. The letter of the plaintiff's solicitor of the 15th of January, with its concluding question, "What is the difficulty in ousting the tenant?" appears to us to shew not only that the plaintiff did not repudiate the contract, which, indeed, having re-sold at a profit, it was his interest to get completed, but that he was willing to afford time for the necessary steps being taken to obtain possession of the property. The refusal to complete was the act of the sellers, who chose to break their contract rather than undergo an expense which would have enabled them to perform the contract, though the expense might have made it an unprofitable one to them. It is, no doubt, true that the defendants could not have ousted the mortgagor by ejectment by the 26th of December, the time fixed by the conditions of sale for completing

(1) 2 W. Bl. 1078.

the transaction; but so long as the purchaser was willing to waive the question as to time, the sellers, more especially as the stipulation was one made in their favour, could not take advantage of a delay occasioned by their own default. Furthermore, the stipulation as to time had, in fact, been waived, for the correspondence which terminated on the defendants rescinding the contract all took place after the date of the 26th of December. We must take it, therefore, that the contract was wilfully broken by the defendants without lawful excuse. The question is, whether the rule established by the case of *Flureau* v. *Thornhill* (1), or by any of the cases decided on the authority of that case, is applicable to the present. We think it is not.

The question mainly turns on whether the rule referred to is an exceptional one, and therefore only applicable to the special circumstances with reference to which it has been laid down, or one which, from any peculiarity in the nature of contracts relating to the transfer of real property, ought, in the absence of fraud, to be extended to contracts of this description. Now, however firmly settled the law as laid down in *Flureau* v. *Thornhill* (1) may be, it must be admitted that that case itself is anything but satisfactory. The question came before the Court for the first time, yet no reasons for the decision are given by the judges. An earlier case, indeed, from Palmer's Reports (termed *Brig's Case*) (2), is referred to in the books as a case in point. But when that case, which was an application for a prohibition to the Court of the Marches in Wales, is referred to, all that appears is that the plaintiff having paid a fine as the consideration for a lease, and the intended lessor having been evicted before the lease was made, whereupon the plaintiff brought his suit in the Court of the Marches, it was said by the Court of King's Bench on the subject of damages, that an action on the case would lie for the loss of the benefit of the bargain, in which the plaintiff would recover, not only what he had paid for a fine, but also damages for breach of the contract; but that an action for debt would not lie, because the plaintiff had not given his money with a view of having it returned. But as to what was the extent or the limit of the damages, which the plaintiff might recover for the loss of his bargain, nothing was said

(1) 2 W. Bl. 1078. (2) Palm. 364.

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though the term "damages for the loss of the benefit gain" would rather seem to imply more than the fin the expenses incurred by the disappointed party. The p thus come before the Court for the first time, it is certai factory to find that in the absence of precedent or au Court assign no principle for a decision which must be have been an exceptional departure from the genera damages for breach of contract. "I think," says De G "the verdict is wrong in point of law. Upon a contra chase, if the title proves bad, and the vendor is (witho capable of making a good one, I do not think that t can be entitled to any damages for the intended goo bargain, which he supposes he has lost." Gould, J. wa opinion. Blackstone, J. was of the same opinion, a "These contracts are merely upon condition, frequent but always implied, that the vendor has a good title. the return of the deposit with interest and costs, is a expected." Nares, J. at first hesitated; but next mor that he concurred with the other judges.

It certainly would have been more satisfactory if, ing down so important and at the same time exce the judges had given the reasons of their decision future cases. We are left in doubt whether the deci on an established practice of conveyancers and solici been suggested, on the ground that in the complicat law of real property the owner of an estate is often u out such a title as a purchaser will be bound to parties, therefore, are only placed on fair terms if, on rejecting the title, the liability of the seller shall be repayment of the deposit and the expenses of inv title. In *Walker* v. *Moore* (2) Littledale, J., says, tract for the purchase of lands is made, each pa know that the title may prove defective, and mu proceed upon that knowledge." And Parke, J., sa absence of any express stipulation about it, the considered as content that the damages, in the ev

(1) *Flureau* v. *Thornhill*, 2 W. Bl. 1078. (2) 10 B. 422.
(3) 10 B. & C. at p. 423.

proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain." These dicta, however, throw no light on the question whether the understanding referred to is to be implied from the rule laid down, or the rule has been based on an understanding already established in practice. The decision in *Flureau* v. *Thornhill* (1) is further open to exception in this, that it introduces a qualification into the rule, that it shall only be applied in the absence of fraud. The inconsistency of this qualification with general rules, according to which motives are inadmissible in estimating damages for breach of contract, has been fully pointed out by Mr. Sedgwick in his most able work on Damages. (2) And in the recent case of *Sikes* v. *Wild* (3), Erle, C.J., appears to speak doubtingly of the position that "actual fraud is necessary to take away the protection."

It is, therefore, not altogether to be wondered at that Lord Tenterden should have expressed himself not satisfied of the soundness of this decision. In *Hopkins* v. *Grazebrook* (4), he says, "Upon the present occasion I will only say that, if it is advanced as a general proposition that, where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration."

The precedent of *Flureau* v. *Thornhill* (1) was, however, followed in the succeeding cases of *Bratt* v. *Ellis*, and *Jones* v. *Dyke*, reported in the appendix to Sugden on Vendors and Purchasers, Nos. 5 and 6. The latter of these cases was a nisi prius decision, but the former was a decision of the Court of Common Pleas in banco. Neither of them is, however, found in the regular reports, and though cited in the argument in *Hopkins* v. *Grazebrook* (5), they do not appear to have been deemed conclusive by Lord Tenterden. But in the subsequent case of *Walker* v. *Moore* (6), this Court upheld the rule, and refused to allow to the plaintiff, who, having agreed for the purchase of an estate, had, before comparing the title deeds with the abstract, re-sold a

(1) 2 W. Bl. 1078.
(2) Sedgwick on Damages, 2nd Ed. pp. 187, 188, 204–210.
(3) 4 B. & S. at p. 424.
(4) 6 B. & C. at p. 33.
(5) 6 B. & C. 31.
(6) 10 B. & C. 416.

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portion, but afterwards found that the title was defective, either the loss of profits on the re-sale, or the expenses of the re-sale, or the sums he was liable to pay to parties with whom he had contracted. Besides being recognized as law in the subsequent case of *Robinson* v. *Harman* (1), the rule was upheld by the Court of Common Pleas in the case of *Worthington* v. *Warrington* (2), and by the Court of Queen's Bench in Ireland in the case of *Buckley* v. *Dawson* (3), and has been extended to a new class of cases by the Court of Common Pleas in the case of *Pounsett* v. *Fuller* (4), and by this Court and the Court of Exchequer Chamber in the recent case of *Sikes* v. *Wild.* (5) We must, therefore, not be considered, in canvassing the decision in *Flureau* v. *Thornhill* (6), upheld, as it has been, by all these authorities, as intending to dispute the law as settled by that case. Our purpose is to consider whether the rule laid down is exceptional and confined to breach of contract from inability to make out a sufficient title, or is applicable to breach of contract in respect of the sale of real property from whatsoever cause arising.

In two well-known cases the rule was treated as exceptional and as limited as above stated. In *Hopkins* v. *Grazebrook* (7), where the defendant, having contracted for the purchase of real estate, but not having obtained a conveyance, had re-sold to the plaintiff, but failed to complete his contract by reason of his vendor being unable to convey to him, this Court, holding the circumstances to be materially different from those in *Flureau* v. *Thornhill* (6) refused to apply the rule of the latter case, and held the defendant liable, not only in respect of the expenses which the plaintiff had incurred, but also in respect of the loss sustained by the plaintiff in not having the contract carried into effect. Lord Tenterden, distinguishing the case from *Flureau* v. *Thornhill,* observes (8), "There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase-money with interest;

(1) 1 Ex. 850; 18 L. J. (Ex.) 202.
(2) 8 C. B. 134; 18 L. J. (C.P.) 350.
(3) 4 Ir. C. L. Rep. 211.
(4) 17 C. B. 660; 25 L. J. (C.P.) 145.
(5) 1 B. & S. 587; 30 L. J. (Q.B.) 325; 4 B. & S. 421; 32 L. J. (Q.B.) 375.
(6) 2 W. Bl. 1078.
(7) 6 B. & C. 31.
(8) 6 B. & C. at p. 33.

here no such offer was or could be made. The defendant had, unfortunately, put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract." And Bayley, J., says (1), "The case of *Flureau* v. *Thornhill* (2) is very different from this, for here the vendor has nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has a satisfactory title, and if he holds out as his own that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted."

The case of *Hopkins* v. *Grazebrook* (3) has been, it is true, more than once questioned by high authority, as inconsistent with the decision in *Flureau* v. *Thornhill* (2), but with the utmost deference for the opinions referred to, if the case of *Hopkins* v. *Grazebrook* is considered on its true grounds, it appears plainly distinguishable from *Flureau* v. *Thornhill* (2), and stands upon a perfectly intelligible and sound foundation. There is an obvious difference between the case of a man who, being in possession and the undoubted owner of real property, is unable to make out a marketable title, and that of one who, not being the owner, but having only a contract for the purchase of real estate, takes upon himself to sell it to another as his own, and as if the title were his to convey. The difficulty of making out title, which exists in the one case and forms the foundation of the rule, and the justification of the exceptional departure from ordinary principles, is wholly wanting in the other. It is upon this distinction, as it appears to us, that the Court of King's Bench proceeded in *Hopkins* v. *Grazebrook*. (3) It is true that, in criticising that case, it has been said that the decision proceeded on the ground of the misconduct of the defendant. This assertion, which appears to have been founded on an unguarded expression of Bailey, J., in *Walker* v. *Moore* (4), where, distinguishing that case from *Hopkins* v. *Grazebrook*, he says that in the latter case the

(1) 1 6 B. & C. at p. 34. (2) 2 W. Bl. 1078. (3) 6 B. & C. 31.
(4) 10 B. & C. at p. 420.

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Court were of opinion "that the defendant had been in fault in representing himself as the owner of the property," seems to us altogether inaccurate. There is no suggestion in the language of Lord Tenterden, or of Mr. Justice Bayley himself, of any misconduct in the defendant. It merely comes to this, that a man, who undertakes to sell what he had not secured the command of, has only himself to blame, and is not protected by a rule which has reference solely to difficulty in making out title. The matter is put on its true footing by Parke, B., in *Robinson* v. *Harman* (1), where, precisely the same point having arisen, the Court, without hesitation, adopted the principle of *Hopkins* v. *Grazebrook*. Parke, B. there says, "The rule of the common law is that, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of *Flureau* v. *Thornhill* (2) qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case comes within the rule of the common law, and I am unable to distinguish it from *Hopkins* v. *Grazebrook*." (3)

Viewed by the light of what is said by Lord Wensleydale and Alderson, B., in *Robinson* v. *Harman* (1), as also upon general principles, the whole matter seems capable of being put on a clear and intelligible footing. By the law of England, as a general rule, a vendor, who, from whatever cause, fails to perform his contract, is bound, as was said by Lord Wensleydale in the case referred to, to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed. If a man sells a cargo of goods not yet come to hand, but which he believes to have been consigned to him from abroad, and the goods fail to arrive, it will be no answer to the intended purchaser to say that a third party, who had engaged to consign

(1) 1 Ex. at p. 855; 18 L. J. (Ex.) at p. 204.
(2) 2 W. Bl. 1078.
(3) 6 B. & C. 31.

the goods to the seller, has deceived or disappointed him. The purchaser will be entitled to the difference between the contract and the market price. There is nothing in the nature of real property which, either on technical or general grounds, should take a contract for the sale of real estate out of this general rule, with one single exception—namely, that owing to the state of the law as to real property, the undoubted owner of an estate often finds, unexpectedly, difficulty in making out a title which he cannot overcome: if, an obligation to make out title being implied on every such contract, the opposite party rejects the title and repudiates the contract, it seems not altogether unreasonable that he shall be entitled to no more than the return of the deposit, if any, and the expense of investigating the title. In this exceptional case he is put not in the condition in which he would have been if the contract had been performed, but in the condition in which he would have been if the contract had not been made. He is where he was before, without the estate and the benefits it would have brought him if a title could have been made to it. But the limit of the exception is to be found in the reason on which it is based: the reason ceasing, the rule should also cease. It can properly have no application where the non-performance of the contract arises not from a difficulty as to title, but from the fact of the party who engages to sell not having first secured to himself the property in the thing of which he takes on himself to dispose. In such case, there seems no sound reason why the consequences which arise on a breach of contract in the sale of goods should not equally attach. Far from seeing any grounds, either in law or reason, for extending the rule, there appear to us good grounds for the contrary. In our view, notwithstanding what is said by Erle, C.J., in *Sikes* v. *Wild* (1), the rule is an anomalous one—that is to say, it is a departure from general principles, and inconsistent with ordinary rules of law, based upon and applicable to a special and exceptional state of things alone. There is, therefore, no reason, in a legal point of view, for extending it; while, on the other hand, there seems good reason for not encouraging men to affect to sell property, the power to dispose of which they have not secured, and thereby to entail inconvenience and possible

(1) 4 B. & S. at p. 423; 32 L. J. (Q.B.) at p. 376.

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loss on the purchasers without, at least, bringing to the knowledge of the latter the real position in which they stand.

The cases of *Hopkins* v. *Grazebrook* (1) and *Robinson* v. *Harman* (2) have, it is true, been materially entrenched upon by the judgment of the Court of Common Pleas in the case of *Pounsett* v. *Fuller* (3), and that of this Court and the Court of Exchequer Chamber in *Sikes* v. *Wild.* (4) In the first of these cases it was held that, where a party had sold the shooting of a manor, having merely an equitable title, but having a fair reason to believe that he had a right to sell, he was not liable beyond the expense of examining the title and nominal damages. In *Sikes* v. *Wild* (4) real estate had been left to the defendants on trust to sell, but by a marriage settlement the land was vested in trustees to secure an annuity to the widow of the devisor. The defendants, or rather their solicitor, who was acting for them, was aware that a title free from incumbrance could not be made without the assent of the widow and her trustees; but the solicitor had obtained a verbal promise from the widow that in the event of the sale she would consent to have her security transferred to another property, and (as found by the jury) he believed, and had reasonable grounds for believing, that he would be able to make a good title free from incumbrance. After the sale, however, the widow refused to assent. This Court, and afterwards the Court of Exchequer Chamber, on appeal, with the approbation of Lord St. Leonards (5), whose opinion on the subject is, we need not say, of the greatest weight, held that the liability of the defendants was limited to the deposit and the expense of investigating the title, and that the plaintiff was not entitled to recover anything for the loss of his bargain.

These decisions have not only given effect to the rule as originally laid down, but have, no doubt, further extended it in a most important particular. In each of the earlier cases the defendant, being in possession, and having the legal estate, had only failed to complete the contract by reason of his inability to make out such a title as the purchaser was bound to take. It seemed just that if

(1) 6 B. & C. 31.
(2) 1 Ex. 850; 18 L. J. (Ex.) 202.
(3) 17 C. B. 660; 25 L. J. (C.P.) 145.
(4) 1 B. & S. 587; 30 L. J. (Q.B.) 325; 4 B. & S. 421; 32 L. J. (Q.B.) 375.
(5) Vend. & Pur. 14th ed. p. 360-361.

the latter thought fit to refuse to accept the title the seller should be liable to no more than the restitution of the deposit and the expense of investigating the title. But the possession of an equitable title, and the reasonable belief of obtaining the legal estate, so as to satisfy the exigency of the contract, were not deemed sufficient to relieve the seller from ulterior damages. In *Hopkins* v. *Grazebrook* (1) Bayley, J., distinguished the case from *Flureau* v. *Thornhill* (2) on the express ground that the defendant had nothing but an equitable title. In *Robinson* v. *Harman* (3) the defendant had, in like manner, an equitable title, but not being in a condition to convey the legal estate, was held liable in damages.

So far as the cases of *Pouncett* v. *Fuller* (4) and *Sikes* v. *Wild* (5) may be considered to have enlarged the rule in *Flureau* v. *Thornhill* (2), and narrowed the decision in *Hopkins* v. *Grazebrook* (1) and *Robinson* v. *Harman* (3), we are, no doubt, bound by them. But they have not gone the length of expressly overruling these cases; and believing them to have been rightly decided, and to be based on sound principles, we are not disposed to entrench upon them further than we are compelled.

Of course the observations we have made as to the rule in *Flureau* v. *Thornhill* (2) apply with equal, if not with greater force, to a case where a contract is broken, not in respect of inability to transfer property, but to deliver possession. We can see no reason for giving immunity to a vendor, who engages to sell an estate and deliver possession, without first securing the possession which he thus undertakes to deliver.

A fortiori, according to our opinion, the rule in *Flureau* v. *Thornhill* (2) can have no application where the failure either to make out a title, or to give possession, arises not from the inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession, on the score of expense. In such case he ought not to be in a better position than a vendor, who, having contracted to sell and deliver goods by a certain day, declines to fulfill, because an increase in the cost of procuring them has made

(1) 6 B. & C. at p. 34.
(2) 2 W. Bl. 1078.
(3) 1 Ex. 850; 18 L. J. (Ex.) 202.
(4) 17 C. B. 660; 25 L. J. (C.P.) 145.
(5) 1 B. & S. 587; 30 L. J. (Q.B.) 325; 4 B. & S. 421; 32 L. J. (Q.B.) 375.

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his contract a losing one. In our judgment, therefore, the contention of the defendants, that the rule in *Flureau* v. *Thornhill* (1) is applicable to such a case as the present, fails; if it is to be extended to embrace such a case, it must be by the decision of a Court of appellate jurisdiction.

The last point taken, on the part of the defendants, was that the damages sought to be recovered were too remote, when tested by the rule established in *Hadley* v. *Baxendale*. (2) We think that this objection also fails. The purchase of real property sold by auction for the purpose of re-sale is a matter of everyday occurrence; and the possibility of a re-sale cannot be taken to be beyond the contemplation of the parties to such a contract. In all the cases on this subject which have come before the Courts, this objection, if well founded, would have been a conclusive answer to the claim for damages; but in none of them was it taken. In *Hopkins* v. *Grazebrook* (3), and *Robinson* v. *Harman* (4), it would have afforded a complete defence; but in both those cases damages were allowed. Considering those cases as authority, so far as they have not been qualified by the decisions in recent cases, we consider them as authorities for holding that damages for the loss arising from a breach of contract on the sale of real estate may properly be allowed in an action on such a breach.

The rule to enter the verdict for the defendants must therefore be discharged.

Rule discharged.

Attorney for plaintiff: *Engel.*

Attorneys for defendants: *Lewis & Sons.*

(1) 2 W. Bl. 1078.

(2) 9 Ex. 341; 23 L. J. (Ex.) 179.

(3) 6 B. & C. 31.

(4) 1 Ex. 850; 18 L. J. (Ex.) 202.

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May 7.

Costs—County Courts Act, 1867 (30 & 31 *Vict. c.* 142)—*Verdict recovered before passing of the Act—Power to grant Order under repealed acts*, 13 & 14 *Vict. c.* 61, *s.* 11, 15 & 16 *Vict. c.* 54, *s.* 4—*Statute of Gloster*, 6 *Ed.* 1, *c.* 1.

The plaintiff, in an action of trespass, obtained a verdict under 5*l.* on the 12th of August, 1867, and was then entitled to a judgment with no costs, by reason of 13 & 14 Vict. c. 61, s. 11, unless he obtained a certificate or order, but, as title came in question, the plaintiff was entitled to obtain an order for costs, under 15 & 16 Vict. c. 54, s. 4, on the ground that no plaint could have been entered in the county court, but he did not obtain such an order, nor had he signed judgment on the 1st of January, 1868. On that day the 30 & 31 Vict. c. 142 (which received the royal assent the 20th of August, 1867) came into operation, and by it the above sections were repealed. The plaintiff then claimed costs:—

Held, that the plaintiff, having under the then existing statutes become entitled to a judgment for the sum recovered, and no costs, unless he got an order, the transaction was complete, and the subsequent repeal of the statutes could not operate to give him a right to a different judgment. Secondly, that, as the section authorizing the Court to make the order giving costs was repealed, the Court had no power now to make the order.

Restall v. *London and South Western Railway Company* (Law Rep. 3 Ex. 141), dissented from; *Morgan* v. *Thorne* (7 M. & W. 400), followed.

THIS was an action of trespass, tried before Blackburn, J., at the Surrey summer assizes, on the 12th of August, 1867, when the plaintiff obtained a verdict for 40*s.*; title to land came in question; but the plaintiff did not obtain any order for costs; and judgment had not been signed on the 1st of January, 1868.

In Hilary Term, *M. Chambers, Q.C.*, obtained a rule calling on the defendant to shew cause why the plaintiff should not have his costs of suit, under the statutes 15 & 16 Vict. c. 54, and 30 & 31 Vict. c. 142, or under the Statute of Gloster, 6 Ed. 1, c. 1.

April 27. *Holl* shewed cause.

M. Chambers, Q.C., and *Beasley*, supported the rule.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

May 7. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. This was a rule obtained in Hilary Term in this

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year by Mr. Chambers, calling on the defendant to shew cause why the master should not tax the plaintiff's costs.

The facts were, that the plaintiff commenced an action of trespass before the 20th of August, 1867, the day on which the 30 & 31 Vict. c. 142, received the royal assent. He recovered at the summer assizes at Croydon a verdict for less than 5*l.*, but title to land *did* come in question, so that (whilst the law continued to be regulated by the 13 & 14 Vict. c. 61, ss. 11 and 12, and 15 & 16 Vict. c. 54, s. 4) the plaintiff was, by 13 & 14 Vict. c. 61, s. 11, entitled to a judgment for the amount of the verdict, and no costs, unless the judge before whom the cause was tried certified on the record (which in the present case he did not do), or the plaintiff obtained an order from a judge under the 15 & 16 Vict. c. 54, s. 4, which last order the plaintiff in the present case would have had a right to obtain, as in fact no action could have been brought in the county court. He did not, however, obtain such an order before the 1st of January, 1868, on which day the 30 & 31 Vict. c. 142 (by s. 36) came into operation, and when, consequently, the several enactments specified in schedule (C) to that Act were repealed. Amongst those enactments are 13 & 14 Vict. c. 61, ss. 11 and 12, and 15 & 16 Vict. c. 54, s. 4.

There had been several decisions at chambers, in which judges had refused to make orders under these Acts or the City of London Act, on the ground that after the repeal of these statutes the judge had no longer power to make such an order; and this Court, on the authority of *Morgan* v. *Thorne* (1), had refused to grant rules to set aside those orders, but being informed by Mr. Chambers that the Court of Exchequer had granted a rule in a similar case, *Restall* v. *London and South Western Railway Company* (2), we, in deference to their authority, did so also.

The rule was argued in this term before my Brothers Mellor and Lush and myself. At the close of the argument we were all of opinion that the rule should be discharged; but proposed to delay our judgment for the purpose of consulting the Court of Exchequer, and learning their views on the case pending before them. We then learned for the first time that the Court of Exchequer had given judgment, making absolute the rule in *Restall* v. *London*

(1) 7 M. & W. 400.

(2) Law Rep. 3 Ex. 141.

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and South Western Railway Company. (1) We took time to consider the effect of that judgment.

The dates in that case were not quite identical with those in the case at bar. There the verdict was obtained in December, 1867, but a point was reserved at the trial, so that no application could have been made for an order till after the 1st of January. In the case at bar, the plaintiff had the whole of Michaelmas Term, during which he might have obtained an order and did not. But the Court of Exchequer do not appear to have proceeded on this distinction. They decide, generally, that a plaintiff in such a case is entitled to an order for costs ex debito justitiæ, and if this were a matter which could be brought into a court of error, we should consider ourselves bound by the decision, whether we agreed with it or not. But as the case cannot be reviewed in error, we are not bound by it. It is an authority to be considered with great respect, and not to be departed from unless we clearly entertain an opinion that it is not right: but that is all. And we have come to the conclusion that we have no power to make such an order as is asked for, and that the plaintiff is not entitled to any costs without it.

Our reasons are as follows: The Statute of Gloster, 6 Ed. 1, c. 1, entitled all plaintiffs who recovered damages to a judgment for costs as well as damages. The statute 13 & 14 Vict. c. 61, s. 11, came by way of a proviso on that statute, enacting that if in any action commenced after the 14th of August, 1850, the plaintiff should recover a sum less than the specified amount, he should have judgment to recover such sum only and no costs, except in the cases thereinafter provided, and that it should not be necessary to enter any suggestion on the record to deprive any such plaintiff of costs. The cases thereinafter provided for were those mentioned in ss. 12 and 13. For the latter section, the 15 & 16 Vict. c. 54, s. 4, was substituted. The effect of those sections is, that on a particular certificate being granted at the trial, or on an order being made by the Court or a judge, the judgment shall be entered as before the Act.

The first point made before us was, that, as the plaintiff did not in fact sign judgment before these enactments were repealed, he was entitled to sign judgment just as if they had never existed. If this argument is correct, all plaintiffs who have at any time

(1) Law Rep. 3 Ex. 141.

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during the last eighteen years, in actions commenced after the 14th of August, 1850, obtained verdicts for trifling sums, and in consequence of not having been able to obtain orders, have not hitherto been able to obtain costs, may, if they have not signed judgment for the sum recovered, now sign judgment and recover their costs. This would be most inconvenient, for such cases must be very numerous. But we think no such effect arises from the repeal of the statutes. The maxim alike of law and justice is, "Nova constitutio futuris formam imponere debet, non præteritis," and therefore, though when a statute is repealed, it is as to new matters as though it had never existed, yet as to transactions already completed under it, it still has full effect: See by Lord Tenterden, *Surtees* v. *Ellison* (1); per Parke, B., *Simpson* v. *Ready*. (2) And we think that when, as in the present case, the plaintiff had under the then existing statutes become entitled to a judgment to recover the sum for which he had a verdict and no costs, unless he got an order, the transaction was complete, and the repeal of the statutes could not operate to give him a right to a different judgment.

In the case before the Exchequer, the plaintiff, it appears, did not become entitled to sign any judgment till after the 1st of January, 1868, and if so, the question there arose whether the transaction was already completed in that case, and whether a plaintiff, who was not in a condition to sign judgment till after the repeal of the 13 & 14 Vict. c. 61, s. 11, was not entitled to judgment for his costs, though his action was ever so frivolous, and though no order ever would or could have been made to give him costs. It seems to us that the 13 & 14 Vict. c. 61, s. 11, enacting a proviso upon the Statute of Gloster, taking out of its operation all actions commenced after the 14th of August, 1850, in which the plaintiff recovers less than a specified amount, is a repeal of that statute so far as it is applicable to such actions, and consequently that (by the operation of 13 & 14 Vict. c. 21, s. 5, or applying to the construction of 30 & 31 Vict. c. 142, the common law rule of construction of which Lord Brougham's Act was declaratory), the repeal of the 13 & 14 Vict. c. 61, s. 11, does not revive the Statute of Gloster as to such actions if commenced

(1) 9 B. & C. at p. 752. (2) 11 M. & W. at p. 346.

before the statute 30 & 31 Vict. c. 142, received the royal assent. The statute, by s. 5, provides for those commenced after that date. On this point the Court of Exchequer expressly refrain from giving any opinion, and it is not necessary for us to decide it.

It was then contended that the Court still had power to make an order for costs under the 15 & 16 Vict. c. 54, s. 4, though that enactment, under which, and under which alone, power was given to make such an order, had ceased to exist; and on this point the Court of Exchequer have decided that they have such power. In *Morgan* v. *Thorne* (1), the plaintiff recovered 1s. damages on the 27th of June, 1840, and the defendant applied to Lord Abinger, before whom the case was tried, to grant a certificate to deprive the plaintiff of costs, under the 43 Eliz. c. 6, s. 2, but he, having reserved a point, declined to do so till after that point was decided. Subsequently, on the 3rd of July following, the 3 & 4 Vict. c. 24, came into operation, repealing the 43 Eliz. c. 6. After that, Lord Abinger granted the certificate; but the full Court, including Lord Abinger, determined that "the effect of this statute being entirely to repeal the 43 Eliz., and to take away every power which the judges had under it, this certificate is void, and cannot operate to deprive the plaintiff of costs." The legislature had not intended this consequence of the repeal of the statute of Elizabeth, and by 4 & 5 Vict. c. 28, they altered the enactment of the 3 & 4 Vict. c. 24; but the decision of *Morgan* v. *Thorne* (1), was not reversed. It does not appear that this case was brought to the notice of the Court of Exchequer in *Restall* v. *London and South Western Railway Company* (2); at all events, it is not distinguished in their judgment; and it seems to us that the two decisions are not consistent. We must follow one, and depart from the other, and the case of *Morgan* v. *Thorne* (1) being in accordance with our own opinion, we follow it.

The rule, therefore, must be discharged.

Rule discharged. (3)

Attorney for plaintiff: *J. W. Hicklin.*
Attorney for defendant: *F. W. Snell.*

(1) 7 M. & W. 400. (2) Law Rep. 3 Ex. 141.
(3) See *Oldreeve* v. *Puckridge*, Law Rep. 3 Ex. 145.

1868
April 23.

ALLHUSEN and Another *v.* MALGAREJO.

Practice—Summons against Foreigner residing without Jurisdiction—Cause of Action—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *ss.* 18, 19.

The defendant, a foreigner residing abroad, entered into a contract with the plaintiffs abroad to sell them a quantity of manganese, to be delivered at Newcastle-upon-Tyne. The defendant delivered part, but failed to deliver the rest. The plaintiffs issued a writ under ss. 18 and 19 of the Common Law Procedure Act, 1852, and after notice served upon the defendant abroad, applied to the Court to be at liberty to proceed against the defendant:—

Held, that, as the whole cause of action did not arise within the jurisdiction of the superior courts, the plaintiffs were not entitled to proceed.

Sichel v. *Borch* (2 H. & C. 954; 33 L. J. (Ex.) 179) followed.

Motion for a rule that the plaintiffs might be at liberty to proceed in this action under s. 19 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). (1)

(1) 15 & 16 Vict. c. 76, s. 18:—"In case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place (except in Scotland or Ireland), it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the schedule (A) to this act annexed, marked No. 2, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; and it shall be lawful for the Court or judge, upon being satisfied by affidavit that *there is a cause of action, which arose within the jurisdiction, or in respect of a breach of contract made within the jurisdiction*, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case."

Section 19:—"In an action against a person residing out of the jurisdiction of the said courts, and not being a British subject, the like proceedings may be taken as against a British subject residing out of the jurisdiction, save that in lieu of the form of writ of summons in the schedule (A) to this act annexed, marked No. 2, the plaintiff shall issue a writ of summons according to the form contained in the said schedule (A), marked No. 3, and shall in manner aforesaid serve a notice of such last-mentioned writ upon the defendant

The plaintiffs carry on business at Newcastle-upon-Tyne, and the defendant and one E. P. Barboza also carried on business at the same place, under the style of Garrido Barboza & Co. But the defendant was a foreigner, residing at Gibraleon in Spain. On the 20th of January, 1866, the plaintiffs entered into a contract with Garrido Barboza & Co., for the purchase of 1000 tons of Spanish manganese, to be delivered at Newcastle-upon-Tyne; 300 tons before the end of April, 300 tons in May and June, and the remainder in July and August. The contract note was signed by the plaintiffs and Garrido Barboza & Co. On the 19th of March, 1866, the plaintiffs, at Gibraleon in the kingdom of Spain, signed on the back of the original contract a document as follows: "It is agreed that this contract is to be extended in the manner following, that in addition to a thousand tons already purchased, we shall take 5040 tons during twelve months, to begin from May 1 next. That delivery shall be made at the rate of 420 tons per month, and that all other conditions shall be the same as those described in the within contract." This contract on the same day was signed at Gibraleon by Barboza, and on the 26th of the same month at the same place by the defendant.

Garrido Barboza & Co. subsequently delivered 2077 tons of manganese, but they did not deliver any further portion.

The plaintiffs brought an action to recover damages for a breach of the contract, and issued a writ in pursuance of s. 19 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and caused a notice of the writ to be served on the defendant, pursuant to the section. No appearance having been entered by the defendant, a summons was taken out before the master by the plaintiffs, for leave to proceed in the action, which he refused to grant. The plaintiffs appealed from his decision to Martin, B., who dismissed the appeal.

Beresford, in support of the motion. The question turns on the

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therein mentioned, which notice shall be in the form contained in the said schedule also marked No. 3; and such service shall be of the same force and effect as the service of the writ of summons in any action against a British subject resident abroad, and by leave of the Court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon."

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construction to be put on the words "a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction," in s. 18 of the Common Law Procedure Act, 1852. The contract sued on was made abroad, but the breach occurred at Newcastle, within the jurisdiction; if the breach of the contract is in this country it is enough, the cause of action then arises within the jurisdiction. The contract and breach need not both take place here. If the legislature by cause of action meant the whole cause of action, that is the contract and breach, then s. 18 would not be worded as it is, it would not provide for the case of a contract made in this country and a breach occurring abroad. The decisions on the construction of the section are not uniform. In Day's Common Law Procedure Acts, p. 18, it is stated: "The words 'cause of action' in this section have not received a uniform interpretation from the courts, but the better opinion seems to be, that these words mean a substantial part of the cause of action." Two authorities are given in support of this opinion. "Where a cargo had been loaded abroad under a foreign charter-party, a claim for demurrage at an English port was held by Williams, J., at chambers, to be a cause of action arising within the jurisdiction: *Slade* v. *Noel.* (1) So where goods were delivered on board a ship in an English port for a foreign buyer under a contract made abroad, Willes, J., held, at chambers, that an action for the price was maintainable under this section: *Nettlefold* v. *Fünche*, C. P. ex relatione anon: 3rd March, 1866." No doubt *Sichel* v. *Borch* (2) is an authority against the plaintiffs; in that case, in an action against the drawer of a bill of exchange drawn in Norway, payable in London, it was held that the cause of action did not arise within the jurisdiction. Pigott, B., had great doubts whether the Court of Exchequer had come to a right conclusion; that case is also inconsistent with *Chapman* v. *Cotterell* (3), where an action on a promissory note made at Florence, payable in London, was held to be a cause of action on which the defendant could be sued under s. 18 of the Common Law Procedure Act, 1852.

(1) 4 F. & F. 424.
(2) 2 H. & C. 954; 33 L. J. (Ex.) 179.
(3) 3 H. & C. 865; 34 L. J. (Ex.) 186.

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BLACKBURN, J. I do not think there is any doubt in this case. The decision of the master and of my Brother Martin is right. Section 18 of the Common Law Procedure Act, 1852, allows the plaintiff to serve process on a British subject, and s. 19 on a foreigner, residing out of the jurisdiction of the superior courts, on condition that a judge is satisfied that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction. The meaning of these words is plain, and they do not apply to the present case. The facts are that a contract was made in this country for the supply of goods to be delivered at Newcastle; but that contract was in effect extended by another contract entered into with reference to a larger quantity of goods, which was made and signed at Gibraleon by the defendant, who is a foreigner residing without the jurisdiction. That contract was also to deliver goods at Newcastle; there has been a breach of that contract, and it is with respect of it that the plaintiff is desirous of suing. The question is, is that a cause of action within the meaning of ss. 18 and 19? The expression "cause of action," means the whole cause of action: that is, all the facts which together constitute the plaintiffs' right to maintain the action. It is not enough to shew that, though the contract was made abroad, the breach occurred within the jurisdiction. If the whole cause of action,—that is, the contract and the breach,—does not arise within the jurisdiction, then ss. 18 and 19 have no application.

The Court of Exchequer have decided this point in this way, and in my opinion that decision is quite right. Two cases are given in a note to s. 18, in Mr. Day's Common Law Procedure Acts: *Slade* v. *Noel* (1), and *Nettlefold* v. *Fünche* (2), in which it is said that although the contracts were made abroad, yet the cause of action, within the meaning of s. 18, arose within the jurisdiction. Those cases appear to be reported ex relatione. It is a mere assumption that the learned judges decided them on the ground that the whole cause of action arose within the jurisdiction. *Sichel* v. *Borch* (3), has been since decided, and I think rightly decided.

There are numerous authorities under the old county court acts,

(1) 4 F. & F. 424.
(2) C. P. 3rd March, 1866.
(3) 2 H. & C. 954; 33 L. J. (Ex.) 179.

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which decide that "cause of action" to give those courts jurisdiction, meant that all things which go to constitute the cause of action must occur within the jurisdiction.

MELLOR, J. The words "cause of action" in s. 18, mean that the whole cause of action must arise in this country: *Sichel* v. *Borch* (1), is directly in point, and I think it rightly decided. If I had found any authority the other way, I might have hesitated, but the cases which have been cited from Mr. Day's book are too doubtful for us to act upon. I agree with the case in the Exchequer, and am bound by it.

LUSH, J. I am of the same opinion. The words "cause of action" in s. 18, is a comprehensive term which includes every circumstance which goes to make up a contract and breach. If the language of this section had been similar to s. 128 of 9 & 10 Vict. c. 95, which gives to superior courts concurrent jurisdiction with county courts, it would be different; the words there are "where the cause of action did not arise wholly or in some material point;" but s. 18 of the Common Law Procedure Act, 1852, applies only to cases where the whole cause of action arises within the jurisdiction or where a contract is made here and broken abroad. If a foreigner comes here and makes a contract in this country, and there is a breach abroad, he can be sued here, but if a contract be made with a foreigner abroad and the breach takes place here, he cannot be sued.

Rule refused.

Attorneys for plaintiffs: *Shum & Crossman.*

(1) 2 H. & C. 954; 33 L. J. (Ex.) 179.

LAWRENCE, APPELLANT; KING, RESPONDENT.

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Highway—27 & 28 *Vict. c.* 101, *s.* 25—"*Cattle found lying about any highway.*"

Under 27 & 28 Vict. c. 101, s. 25, the owner is liable to a penalty if cattle, sheep, &c., are found lying about any highway, notwithstanding they are under the control of a keeper at the time.

CASE stated by Justices under 20 & 21 Vict. c. 43.

An information was preferred against the appellant, charging that on, &c., sixteen sheep and twelve lambs, his property, were found lying about a certain highway, contrary to the Highway Act, 1864 (27 & 28 Vict. c. 101). (1)

Upon the hearing of the information the following evidence was given:—The appellant ordered a boy to take the sheep along the highway, and he took them along Potter's Bar Road, leading to Mr. Franks' Lodge Gate; they stopped about 150 yards from the lodge gate, and they grazed on the highway from a quarter before 10 A.M., until ten minutes past 5 P.M. Some of the sheep and lambs laid down in the middle of the road, some on the sides of the road; some were feeding on the grass, and some were nibbling the quick of the hedges; the boy was part of the time walking about and part lying about, he was lying down about an hour in

(1) 27 & 28 Vict. c. 101, s. 25:—"The 74th section of the Highway Act, 1835, shall be repealed, and instead thereof it is enacted, if any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, goat, kid, or swine, is at any time found straying on, or lying about, any highway, or across any part thereof, or by the sides thereof (except on such parts of any highway as pass over any common or waste or unenclosed ground), the owner or owners thereof shall, for every animal so found straying or lying, be liable to a penalty not exceeding 5s., to be recovered in a summary manner, together with the reasonable expense of removing such animal from the highway where it is found, to the fields or stable of the owner or owners, or to the common pound (if any) of the parish where the same shall be found, or to such other place as may have been provided for the purpose. Provided always, that no owner of any such animal shall in any case pay more than the sum of 30s., to be recovered as aforesaid, over and above such reasonable expenses as aforesaid, including the usual fees and charges of the authorized keeper of the pound: Provided also, that nothing in this act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway."

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the middle of the flock. Sometimes some of the sheep got up and others laid down. This was during the whole time.

It was contended on the part of the appellant that, as there was a keeper with the sheep and lambs when found by the complainant, they could not be said to have been found lying about the highway within the meaning of s. 25 of the Highway Act, 1864 (27 & 28 Vict. c. 101), but that in order to render the appellant, as the owner of the sheep and lambs, liable to the penalty under that section, the sheep and lambs should have been found lying about without a keeper.

The justices were of opinion, that inasmuch as the words "without a keeper," which appear in s. 74 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), are omitted from s. 25 of the Highway Act, 1864, the intention of the legislature was to prevent any cattle being allowed to lie about any highway for the purpose of depasturage or otherwise, whether with or without a keeper, as such practice is very common, and is the cause of considerable damage being done to the hedges, banks, and fences of adjoining owners.

No right of pasturage was claimed by the appellant on the sides of the highway; and the justices convicted the appellant; but they found, as a fact, that the animals were under the control of a keeper at the time they were found lying about the highway.

The question for the opinion of the Court was whether the conviction was right.

Denman, Q.C. (*H. Ludlow* with him), for the respondent. The appellant was rightly convicted. The words of s. 25 of 27 & 28 Vict. c. 101, are "straying on" or "lying about" any highway. Cattle in charge of a keeper cannot be said to be straying on a highway, but they may be lying about the highway, notwithstanding that there is a keeper with them. This section is a re-enactment of s. 74 of 5 & 6 Wm. 4, c. 50, and the words "without a keeper" which are in that section, are omitted in the later enactment; it would seem, therefore, that the legislature expressly intended to make it an offence for cattle to be found lying about a highway, although in charge of a keeper. A doubt is raised by the decision in *Morris* v. *Jeffries* (1); but that case is distinguish-

(1) Law Rep. 1 Q. B. 261.

able; there the question was, whether horses grazing in the immediate care of a keeper, were wandering or straying within the meaning of s. 75 of 4 Geo. 4, c. 95; and the decision was that horses in the care of a person could not be said to be wandering or straying. The facts of that case were different, there was no pretence for saying that the horses were lying about the highway.

Poland, for the appellant. This case is governed by the decision of this Court in *Morris* v. *Jeffries*. (1) The language of s. 75 of 4 Geo. 4, c. 95, which was under discussion in that case, is almost identical with s. 25 of 27 & 28 Vict. c. 101.

[BLACKBURN, J. The difference is not in the language of the two statutes but in the facts found. In *Morris* v. *Jeffries* (1) the evidence was that the respondent's horses grazing on the side of the highway were under the control of the carter. They could not therefore be straying on the highway. Here the evidence is that the sheep were lying about the highway, although in the custody of a keeper.]

If a man send a flock of sheep to market in the care of a keeper, and they lie down on the highway to rest, he would, on the respondent's construction of the statute, be liable to be convicted. The object of the legislature was that cattle should not be on the highway without being in the charge of some one. If they are in the custody of a keeper the owner is not liable to be convicted.

Denman, Q.C., was not heard in reply.

BLACKBURN, J. I think that the justices were right not only in their decision, but in the grounds they gave for it. The act of 5 & 6 Wm. 4, c. 50, s. 74, made it an offence if "any horse, &c., was at any time found wandering, straying, or lying, or being depastured on any highway, or on the sides thereof, without a keeper." According to the construction this Court, in *Morris* v. *Jeffries* (1), put on the words "wandering or straying" in s. 75 of 4 Geo. 4, c. 95, horses could not be deemed to be wandering or straying if they were in charge of a keeper; but s. 74 of 5 & 6 Wm. 4, c. 50, further says, "or lying, or being depastured on any highway, or on the sides thereof, without a keeper;" so that if cattle were sent out with a keeper, and the keeper neglected his

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duty, and suffered the animals to lie about the highway, under that statute it would not be an offence in the owner. But by 27 & 28 Vict. c. 101, s. 25, the legislature have repealed s. 74 of 5 & 6 Wm. 4, c. 50, and re-enacted the section in nearly, but not precisely, the same language. Section 25 says, "if any horse, &c., is found straying on or lying about any highway, or across any part thereof, or by the sides thereof (except on such parts of any highway as pass over any common, or waste, or unenclosed ground), the owner shall be subject to a penalty; and the section contains a proviso that the statute shall not be deemed to extend to take away any right of pasturage which may exist in the sides of any highway. When we look at the language of this section, I think there can be no doubt that the intention of the legislature was that if cattle are found straying on the highway, which would imply that they were not in the charge of some one who had control over them, that should be an offence, and then, as the words "lying about" are also in this section, omitting the qualification "without a keeper," it is clear the meaning is that if the animals do, in fact, lie about the highway, although there may be a keeper with them, that should also be an offence. If s. 25 of 27 & 28 Vict. c. 101, had been the original enactment, even then its meaning would have been plain; but when we find it is a re-enactment of s. 74 of 5 & 6 Wm. 4, c. 50, with the omission of the words "without a keeper," there can be no doubt whatever as to the meaning of the legislature. It was contended on behalf of the appellant that if cattle driven to market, fatigued with a long journey, were to lie down in the highway, the owner, on this construction of the statute, would be liable to be convicted. I think if cattle driven along a highway were to lie down for a short time, and then were driven on again, they could not be said to be found lying about the highway. Neither would it be an offence if a right of pasture was claimed on the side of the road, and cattle were, in the care of a person, feeding on the roadside in the exercise of the right of pasture. In the present case no right of pasture is claimed, and the evidence shews that the sheep were lying about the highway.

In *Morris* v. *Jeffries* (1) the horses were under the control of a keeper, and were neither straying nor wandering; they were not

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left tethered by the road without any one to look after them, nor were they found lying about the road, which would be an offence under the 4 Geo. 4, c. 95, s. 75, if the keeper allowed the horses or cattle to lie about so as to cause an obstruction to the traffic; but there was no pretence in *Morris* v. *Jeffries* (1) for saying that the horses were lying about the highway. All that was decided there was that animals under the control of a keeper are not wandering or straying, and that decision is not inconsistent with the present.

MELLOR, J. Section 25 of 27 & 28 Vict. c. 101, creates two offences. It is an offence for the owner to allow cattle to stray on the highway; that is, to put cattle on the highway without some one in charge of them. It is also an offence if cattle are in charge of a person, if he permit them to lie about the highway so as to cause a nuisance and obstruction. I therefore think the justices were right, and the conviction is valid.

Judgment for the respondent.

Attorney for appellant: *Wedlake.*
Attorney for respondent: *Beetham.*

(1) Law Rep. 1 Q. B. 261.

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WATKINS, APPELLANT; THE OVERSEERS OF MILTON-NEXT-GRAVESEND, AND OTHERS, RESPONDENTS.

Poor-rate—Occupation—Moorings, rateability of—Easement.

The conservators of the Thames were owners of the soil and bed of the river, and of moorings fixed to the soil of the river. W. used the moorings to moor his hulk, as a floating coal depot, under the following document: "We, the conservators of the Thames, do grant to W. liberty and licence to fasten, and thenceforth keep fastened, his coal hulk to the moorings placed by the conservators in the river, until either party shall have given to the other one calendar month's notice in writing. In consideration whereof W. agrees to pay towards the expenses of placing and maintaining and repairing the moorings the annual sum of 30*l.*" W. was assessed to the poor-rate as occupier of part of the bed of the river:—

Held, that the above document was not a demise, but only granted to W. a licence to use the moorings, and that he was therefore not the occupier, and not liable to be rated.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

1. The question for the opinion of the Court was as to the rateability of the appellant to the poor rates for the parish of Milton-next-Gravesend.

2. In the valuation list of the parish, under 25 & 26 Vict. c. 103, and 27 & 28 Vict. c. 39, the appellant is rated, and in the rate made in pursuance of it, the name of the appellant is thus inserted:—

Name of Occupier.	Name of Owner.	Description of Property.	Name and Description of Property.	Estimated Extent.	Gross Estimated Rental.	Probable Value.
Watkins.	Watkins.	Land, and coal hulk thereon.	"Black Prince."	1600 tons.	300*l.*	240*l.*

3. The land mentioned in the third column is part of the bed of the River Thames, within the parish of Milton, occupied by the moorings hereafter mentioned. By virtue of the Conservancy Acts 1857 and 1864, the bed and soil of the river Thames are vested in the conservators of the river. The coal hulk belongs to the appellant, and lies afloat on the river Thames, within the boundary of the parish of Milton. It is an iron-built vessel of

1600 tons, expressly constructed for the purpose of being fastened to the moorings, and is used as a depository for coals.

4. The hulk has not in itself any means of locomotion, either by sails or engines. The coals stored therein are brought up in colliers, which can run alongside at all times of the tide, and discharge their cargo into it. The coals, being thus deposited in the same way as coals are deposited in warehouses or storehouses built on wharfs, are partly sold to the owners of steam-tugs and other steam vessels, and partly used by the appellant for steam-tugs of his own. In either case the steam vessel can receive the coal by coming alongside the hulk, in the same manner as the collier which previously discharged it; or, if occasion should require, the hulk itself, with its store of coals, can be loosed from its moorings, and towed by a steam-tug to any part of the river where there is sufficient water. It has, however, been at its present moorings since July, 1863, without removal; but, in the ordinary course of things, will, from time to time, at intervals of four or five years, require removal for repairs.

5. The hulk is fitted with proper apparatus for lifting coals and transferring them from the colliers to its own hold, and from its own hold to any vessel which may be placed alongside, and also with a cabin, which is occupied by servants of the appellant, who reside there day and night, and have charge of the hulk and the coals kept there in store.

6. The moorings to which the hulk is secured are permanently fixed in the bed and soil of the river Thames by, and are the property of, the conservators of the river Thames, incorporated and acting under the provisions of the Thames Conservancy Acts, 1857 and 1864, which are to be taken as part of this case, and such moorings were fixed for the use of the hulks of the appellant. They are not provided with buoys, as is usual with moorings which are laid down for the temporary use of vessels in the river.

7. The moorings consist of two large, iron, fan-shaped screws, which are screwed into the soil or bed of the river to a depth of about eight feet, and at a distance of about forty feet from each other. They are connected together by means of two chains, which are shackled one to each screw, and both to a central ring; from this ring a third chain, called a "pennant," is carried up to

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the surface of the water, where it terminates in another ring, to which ring the hulk is fixed as hereinafter mentioned.

8. The whole of these moorings are the property of the conservators, and they are used by the appellant by virtue of the following document: "We, the conservators of the River Thames, do grant to William Watkins, of 52, Lime Street, City, and Blackwall, liberty and licence to fasten, and henceforth keep fastened, his coal hulk or vessel, called the *Black Prince*, to the moorings placed by the said conservators in the said river at Gravesend Reach, until either party shall have given to the other one calendar month's notice, in writing, to determine and put an end to this licence. In consideration whereof the said William Watkins agrees with the said conservators to pay towards the expenses of the said conservators, of placing, maintaining, and repairing the said moorings, the annual sum of thirty pounds, and the due proportion of thirty pounds for any less period than a year; the first payment to be made on the 29th September, 1864; and the said W. Watkins further agrees that no more than three vessels shall at any one time be fastened or attached to the said coal hulk: Provided, that under no circumstances whatsoever shall the said conservators be liable for any damage or loss arising from, or in consequence of, the breaking of the moorings, chains, or any imperfections, or failure of the said moorings. Dated this third day of August, 1863."

9. The chain cables of the hulk itself are shackled to the upper ring of the moorings above described, and are brought on board through the hawse-pipes and secured to a windlass, by means of which the hulk itself is heaved up to or slacked off from the moorings. The hulk is moored entirely by the stem, and swings with the tide, and alters its position according to the set of the current. It never takes the ground at any time or under any circumstances.

10. The appellant appealed to the assessment committee against the valuation list, but failed to obtain any relief.

11. The appellant thereupon gave notice of appeal to the quarter sessions, against a rate made in accordance with the valuation list. It was agreed that neither party should raise any technical difficulties or objections, and that the case should be decided on the

merits, the Court to be at liberty to draw any inferences of fact, if it should think fit.

12. The question for the opinion of the Court was, is the appellant liable to be rated to the relief of the poor of the parish of Milton, in respect of his occupation of the land and hulk under the circumstances stated?

Barrow (*G. Francis* with him), for the appellant. The appellant could only be liable to be rated in respect of his occupation of land, enhanced in value by his attaching his coal hulk to the moorings fixed to the land. The question is, is the appellant the occupier of the moorings? The test of occupation is the right to bring an action of trespass; the appellant, under the agreement with the conservators, has only a licence to moor his hulk to the moorings, and he could not bring any action of trespass if other persons moored their barges to the same moorings. The agreement being a mere licence or privilege, the appellant has no occupation of the land or moorings, and consequently the hulk is not rateable: *Rex* v. *Trent and Mersey Navigation Company*. (1) It has also been decided in *Rex* v. *Mersey and Irwell Navigation Company* (2) that an easement or privilege is not rateable. In *Reg.* v. *Morrish* (3) the agreement between the Royal Commissioners and Morrish gave the latter the right of selling refreshments to the public who frequented the International Exhibition from the day on which the exhibition was opened, and the Court decided that Morrish had a mere licence to sell refreshments, which would not entail upon him a liability to pay rates. Here the conservators retain possession of the land and moorings, and allow the appellant to use the moorings. It is analogous to the case of a lodger in a house who has a separate apartment; there, even though he had the exclusive occupation, he would not be liable to be rated: *Smith* v. *Overseers of St. Michael, Cambridge*. (4) This case is distinguishable from *Reg.* v. *Forrest*. (5) Here the hulk never rests upon the ground, but can be removed from place to place at the appellant's option, but in that case the appellants were held

(1) 4 B. & C. 57.
(2) 9 B. & C. 95.
(3) 32 L. J. (M.C.) 245.
(4) 3 E. & E. 383, 390; 30 L. J. (M.C.) 74.
(5) 8 E. & B. 890; 27 L. J. (M.C.) 96.

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liable to be rated "for land occupied by the platforms and other matters used as a pier for landing and embarking steamboat passengers," and Lord Campbell, in his judgment, says of *Reg.* v. *Morrison* (1), "there we held a floating-dock not rateable, but for the reason that it had no fixed locality, that it actually was shifted about from place to place, and that it might be used for the purposes for which it was constructed at one place as well as another as a piece of moveable machinery." From the facts of the case as stated, it is clear that the possession and occupation of the moorings are in the conservators, and not in the appellant, and he is not liable to be rated.

Inderwick, for the respondents. The hulk in question, as shewn by the 4th and 5th paragraphs, is occupied by the appellant's servants, and is used as a warehouse for coals; it has no means of locomotion of its own, and it appears from the facts stated to have a local habitation; it is attached to the freehold, and is liable to be rated; *Reg.* v. *Forrest* (2) is directly in point. The fact that the hulk does not rest upon the ground is not the test whether it is liable to be rated; a floating pier attached to the soil is rateable: *Reg.* v. *Leith.* (3) In the case of *Reg.* v. *Morrish* (4) the keys of the doors of the refreshment-room were kept by the police employed on behalf of the commissioners, and Morrish never had the occupation of the premises for twenty-four hours, for he and his servants were locked out every evening and admitted in the morning; he clearly, therefore, was not liable to be rated. The agreement between the conservators and the appellant is more than a mere licence, it is a right exclusively to occupy the moorings, and there is such an occupation by the appellant as renders him liable to be rated. In *Electric Telegraph Company* v. *Overseers of Salford* (5) it was held that a liberty to place posts on the land of another person was an occupation of land within the meaning of 43 Eliz. c. 2, s. 1, and rateable.

[BLACKBURN, J. There the Electric Telegraph Company occupied the land by means of their posts, but that case does not

(1) 1 E. & B. 150; 22 L. J. (M.C.) 14. 17 Jur 486

(2) 8 E. & B. 890; 27 L. J. (M.C.) 96. 4 Jur NS 480

(3) 1 E. & B. 121; 21 L. J. (M.C.) 119.

(4) 32 L. J. (M.C.) 245. 10 Jur NS 971

(5) 11 Ex. 181; 24 L. J. (M.C.) 146. 1 Jur NS. 733.

decide that an easement can be rated. If the facts there were that the railway company, the owners of the land, should place posts on their land, and the telegraph company should be at liberty to fix wire into the posts, it would be like this case.]

The agreement is a demise of the moorings at a fixed rent, with liberty to the appellant to moor his barge to them, paying a sum towards the repairs; he is, therefore, liable to be rated.

BLACKBURN, J. The rate is inartificially expressed. In form it is put as if the property rated were the *Black Prince* hulk itself; but in reality the question is, whether the appellant is the occupier of part of the bed of the river Thames so as to be rateable for the value of the land in the river, the value of the land being enhanced by the fact that the *Black Prince* is moored to that portion of the land. The material facts appear to be stated in the 6th, 7th, and 8th paragraphs of the case. It appears from them that the conservators of the Thames made moorings in the river Thames expressly for the purpose of enabling the hulk to be attached to them, and that these moorings are fixed to the bed of the river, and there can be no doubt that they do occupy part of the soil. They are described as being "two large iron fan-shaped screws, secured to the soil," and are connected together by means of two chains. I think these moorings are so attached to this part of the soil of the river, that if the appellant was the occupier of the moorings he would be occupier of the soil. Then comes the question, is he the occupier of these moorings? The conservators of the river Thames are the owners of the soil, and are the owners of the moorings also, and they might have demised them to the appellant for the mooring of barges, and if they had demised them, the appellant would then have been occupier of the land. There is no doubt that the conservators might retain the possession in themselves, so as to be the occupiers; and for a sum of money, or gratuitously if they pleased, grant to another person the privilege or easement of attaching his barges to these moorings; in which case the conservators would themselves still continue to be the occupiers; and unless there be something in their act to relieve them from being rated, they would be rateable: the value of their occupation being measured

10 C.B. 573

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by the amount paid to them for their licence. In the present case, the question depends on the terms of the written agreement, which are, "the conservators do grant liberty and licence," they do not use the words "and demise." Now, stopping there, without regard to the rest of the agreement, which I do not think qualifies it, there are no words in express terms stating that the conservators meant to part with the possession or to create a tenancy either at will or at suffrance between the appellant and them. In this case, if a tenancy at all, it would be a tenancy from month to month. Is there, then, anything to shew there was such a demise? I think not; there might be many reasons why the conservators would not wish to make a demise; if they made a demise, and a dispute arose as to the terms of the notice to quit, they could not get back the moorings without bringing an action of ejectment. But this much is clear, that they have not, in express terms, said they would demise. Then I think, from the terms in which it is stipulated that they are to pay the money towards maintaining and repairing the moorings, it is implied that the conservators are to maintain and repair them, and although a stipulation to maintain and repair the moorings would not be inconsistent with a demise, it being possible the landlord might demise a house with the implied term that he was to repair, yet primâ facie the person to repair is the person in possession; and with such a thing as this it is more likely the conservators should repair than the appellant, consequently, I think, primâ facie the agreement would not be a demise, but merely a licence. Against that contention it is said the appellant has the sole and exclusive possession of the moorings. It seems, during five years, the appellant has been the sole person who has used them, and I think if any rival hulk were moored there it would have been contrary to what the parties intended, but it does not from this follow that the appellant is liable to be rated as the sole occupier. There may be a grant of many easements which are conveyed solely to one person, and yet do not confer any occupation, such as a way leave to carry coals from a colliery to the seashore; an important right confined to that colliery alone; that does not make the person who has the sole use of a private way over the land rateable; or in the more familiar case of a lodger,

who has the sole right to the use of certain rooms in a house, he is not made by that means rateable if the agreement is that the tenant of the house shall retain the possession, as in the general case of a lodging he does, for the purpose of looking after the management of it; the lodger is merely the inmate. Whenever that happens the lodging-house keeper is rateable, although the lodger is the person in possession; and although he would have a good action against the landlord if he were to put another lodger in occupation with him. So here, I think, the exclusive right to moor the barge which is given from month to month—though there would be a breach of the contract, and an action would lie if another barge were moored there—does not give such an occupation as would render the appellant liable to be rated. By this agreement the conservators bind themselves to let the appellant, and him only, use the moorings until they have given him a month's notice, and it is not a demise. The conclusion at which I have arrived is, that the appellant is not the occupier, but is merely the person having a licence to use the moorings. In the present case we can only say the wrong person is rated, and consequently there must be judgment for the appellant.

MELLOR, J. I am of the same opinion. I think the facts of this case shew that the conservators have put down the moorings and have agreed to repair them. I think that the agreement is nothing more than a personal licence to the appellant to moor his hulk to the moorings; and although no other person can interfere with that right, and the conservators could not allow anybody to do it without bringing an action against them, yet the agreement only amounts to this, "I give you liberty to moor the hulk there, and I will not give the liberty to anybody else." I do not think the fact that the appellant has the exclusive use of the moorings makes any difference. The appellant has nothing more than a licence personally to himself to moor, and he is not the proper person to be rated.

LUSH, J. No doubt the soil in the river into which these moorings are secured is occupied by some one. The question is whether they are occupied by the appellant? The soil of the river

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belongs to the conservators of the river, and the moorings belong to them; primâ facie they are the occupiers, unless they have demised them to the appellant; and on looking at the only document between the parties, it professes only to grant to him the use of the moorings, for a given consideration, for the purpose of mooring his hulk. There is nothing in the circumstances, and no document that at all leads one to suppose there is a demise. Then it is said the conservators put themselves under an obligation to keep these moorings in repair. That strengthens the idea that they intended to keep it in their own occupation, and only to demise what the instrument itself describes as the mere use of them to the appellant. I think he is therefore not liable to be rated.

Judgment for the appellant.

Attorneys for appellant: *Stevens & Co.*

Attorney for respondents: *Southgate, for Southgate & Sons, Gravesend.*

April 27.

THOMPSON *v.* DALLAS.

Costs, ground for allowing, under County Courts Act, 1867 (30 *and* 31 *Vict. c.* 142), *s.* 5—*Practice.*

Where the plaintiff recovers in a superior court a sum not exceeding 20*l.* in an action of contract, or not exceeding 10*l.* in tort, the distance at which the plaintiff resides from the defendant is not to be considered as any ground for the exercise of the discretion to allow costs given to the court or judge by the County Courts Act, 1867, s. 5.

THIS action was commenced in March, 1868, and the plaintiff had obtained judgment by default for 8*l.* 13*s.* The cause of action was for goods sold and delivered by the plaintiff, a wine merchant, carrying on business in Glasgow, to the defendant, carrying on business and residing in London. The cause of action arose and the plaintiff's witnesses resided in Edinburgh. The costs of one witness coming thence to London to give evidence on a day certain and returning immediately would be 12*l.* The costs of the judgment by default were 3*l.* 7*s.* None of the goods were to be dealt with in the way of the defendant's trade, profession, or calling.

Popham Pike moved for a rule calling on the defendant to shew

cause why the Court should not make an order for costs under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5, which enacts, "If in any action commenced after the passing of this act in any of the superior courts the plaintiff shall recover a sum not exceeding 20*l.*, if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall, by rule or order, allow such costs." The statute having by s. 33 repealed s. 128 of 9 & 10 Vict. c. 95, the superior courts have no longer concurrent jurisdiction with the county court where the plaintiff and defendant dwell more than twenty miles apart. But the plaintiff could not have obtained a judgment by default in the county court; and whether the defendant appeared to defend or not, the plaintiff must have been prepared with one witness at least to prove his case at the hearing of the plaint in the county court. The circumstances of this case, therefore, and the much larger amount of costs to what the defendant would have been subjected had the plaintiff sued him in the county court, are sufficient grounds for the Court to make an order for costs.

BLACKBURN, J. The rule must be refused. The judges have met, and discussed the question of how we were to exercise the discretion as to costs which is given under s. 5; and we came to the conclusion that we ought not to consider the distance at which the plaintiff and the defendant lived as any ground for allowing costs. I was principally influenced by the consideration that if we were to make a practice of granting costs, unless on some very special and good ground, the effect would be to induce parties improperly to sue in the superior courts.

MELLOR and LUSH, JJ., concurred.

Rule refused.

Attorneys for plaintiff: *Pike & Son.*

1868 THE QUEEN, on the Prosecution of HENRY SCOTT, Appellant, *v.*
April 29. BENJAMIN HICKLIN and Another, Justices of Wolverhampton, Respondents.

Obscene Publication—Misdemeanor—Seizure and Destruction of Obscene Articles, under 20 *&* 21 *Vict. c.* 83, *s.* 1.

By 20 & 21 Vict. c. 83, s. 1, if upon complaint that there is reason to believe that any obscene books, &c. are kept in any house or other place, for the purpose of sale or distribution, and upon proof that one or more of such articles has been sold or distributed in connection with such place, justices may, upon being satisfied that such articles are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such, order by special warrant that such articles shall be seized, and after summoning the occupier of the house, the same or other justices may, if they are satisfied that the articles seized are of the character stated in the warrant, and have been kept for the purposes aforesaid, order them to be destroyed.

A number of copies of a pamphlet entitled, "The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession," were seized in the appellant's house and ordered by justices of a borough to be destroyed as obscene books within the above section.

On appeal, the following facts were found. The pamphlet consisted of extracts taken from the writings of theologians on the doctrine and discipline of the Romish Church and particularly on the practice of auricular confession. On one side of the page were passages in the original Latin, and opposite to each passage was a free translation in English. The pamphlet also contained a preface and notes condemnatory of the tenets and principles of the writers. About half of the pamphlet related to controversial questions, but the latter half of the pamphlet was grossly obscene, as relating to impure and filthy acts, words, and ideas. The appellant sold the pamphlets at the price he gave for them to any one who applied for them. He did not keep the pamphlets to sell for profit or gain, nor for the purpose of prejudicing good morals, though the indiscriminate sale and circulation of them was calculated to have that effect; but he kept and sold them for the purpose of exposing what he deemed to be the errors of the church of Rome, and particularly the immorality of the confessional. The recorder, being of opinion that the sale and distribution of the pamphlets under the above circumstances would not be a misdemeanor, quashed the order of justices:—

Held, that the order of justices was right: for that the publication of such an obscene pamphlet was a misdemeanor, and was not justified or excused by the appellant's innocent motives or object; he must be taken to have intended the natural consequences of his act.

At the quarter sessions for the borough of Wolverhampton on the 27th of May, 1867, Henry Scott appealed against an order

made by two justices of the borough under 20 & 21 Vict. c. 83 (1), whereby the justices ordered certain books which had been seized all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place, which may have been so entered by virtue of the said warrant, to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles, or any of them, are of the character stated in the warrant, and that such, or any of them, have been kept for any of the purposes aforesaid, it shall be lawful for the justices, and they are hereby required, to order the articles so seized, except such of them as they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal as hereinafter mentioned [s. 4] be given, and such articles shall be in the mean time impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant, or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized."

By s. 4, an appeal is given to the next quarter sessions to any one aggrieved by the determination of justices.

(1) 20 & 21 Vict. c. 83, "An act for more effectually preventing the sale of obscene books, pictures, prints, and other articles," after reciting "that it is expedient to give additional powers for the suppression of the trade in obscene books, prints, drawings, and other obscene articles."

Section 1. It shall be lawful for any metropolitan police magistrate or other stipendiary magistrate, or for any two justices, upon complaint made before them upon oath that the complainant has reason to believe, that any obscene books, &c. are kept in any house, &c., for the purposes of sale or distribution, exhibition for the purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justice that the belief of the said complainant is well founded, and upon such justice being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room or other place, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry

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in the dwelling-house of the appellant, within their jurisdiction, to be destroyed, as being obscene books within the meaning of the statute.

The appellant is a metal broker, residing in the town of Wolverhampton, and a person of respectable position and character. He is a member of a body styled "The Protestant Electoral Union," whose objects are, inter alia, "to protest against those teachings and practices which are un-English, immoral, and blasphemous, to maintain the Protestantism of the Bible and the liberty of England," and "to promote the return to Parliament of men who will assist them in these objects, and particularly will expose and defeat the deep-laid machinations of the Jesuits, and resist grants of money for Romish purposes." In order to promote the objects and principles of this society, the appellant purchased from time to time, at the central office of the society in London, copies of a pamphlet, entitled "The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession;" of which pamphlets he sold between two and three thousand copies at the price he gave for them, viz., 1s. each, to any person who applied for them.

A complaint was thereupon made before two justices of the borough, by a police officer acting under the direction of the Watch Committee of the borough, and the justices issued their warrant under the above statute, by virtue of which warrant 252 of the pamphlets were seized on the premises of the appellant, and ordered by the justices to be destroyed.

The pamphlet (1) consists of extracts taken from the works of certain theologians who have written at various times on the doc-

(1) A copy accompanied and was made part of the case. The authors from which the obscene parts of the pamphlet were taken were Peter Dens, Liguori, Delahogue de Pænitentiâ, Bailly, and Cabassutius—chiefly the first two. In the preface, after alluding to the different authors quoted, and shewing that they were held of great authority in the Roman Catholic Church, the compiler proceeds: "Such, then, is the theology, and such the morals which, by granting 30,000*l.* a-year to Maynooth, we assist in propagating." . . . . "In the latter part of the pamphlet I have given a few extracts without abridgment, to shew into what minute and disgusting details these *holy men* have entered. This alone has been my object, and not the filling of the work with obscenity."

trines and discipline of the Church of Rome, and particularly on the practice of auricular confession. On one side of the page are printed passages in the original Latin, correctly extracted from the works of those writers, and opposite to each extract is placed a free translation of such extract into English. The pamphlet also contains a preface and notes and comments, condemnatory of the tracts and principles laid down by the authors from whose works the extracts are taken. About one half of the pamphlet relates to casuistical and controversial questions which are not obscene, but the remainder of the pamphlet is obscene in fact as relating to impure and filthy acts, words, and ideas. The appellant did not keep or sell the pamphlets for purposes of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlets, as a member of the Protestant Electoral Union, to promote the objects of that society, and to expose what he deems to be errors of the Church of Rome, and particularly the immorality of the Confessional.

The recorder was of opinion that, under these circumstances, the sale and distribution of the pamphlets would not be a misdemeanor, nor, consequently, be proper to be prosecuted as such, and that the possession of them by the appellant was not unlawful within the meaning of the statute. He therefore quashed the order of the justices, and directed the pamphlets seized to be returned to the appellant, subject to the opinion of the Court of Queen's Bench.

If the Court should be of opinion, upon the facts stated, that the sale and distribution of the pamphlets by the appellant would be a misdemeanor, and proper to be prosecuted as such, the order of the justices for destroying the pamphlets so seized was to be enforced; if not, the order was to be quashed.

Kydd, for the appellant. The decision of the recorder was right, the intention of the appellant being innocent, the publication of this pamphlet was not an indictable misdemeanor; and therefore the justices had no jurisdiction to order the copies to be destroyed. The book is controversial.

[COCKBURN, C.J. The recorder has found that the work, at least

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the latter half of it, is obscene, and there can be no doubt of it; and the question is, that being so, are the magistrates deprived of jurisdiction to destroy this obscene work, because the real object of the appellant in distributing it was not to do harm, but good ?]

The criminal intention must be shewn before the justices have jurisdiction; but here that intent is expressly negatived. Thus in *Woodfall's Case* (1), Lord Mansfield told the jury, "That, where an act, in itself indifferent, if done with a particular intent becomes criminal, then the intent must be proved and found; but when the act is in itself unlawful, . . the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." But the question of intent is for the jury, per Lord Ellenborough in *Rex* v. *Lambert* (2); although the law was formerly otherwise: *Rex* v. *Shebbeare* (3); see also, however, per Holt, C.J., in *Tutchin's Case.* (4) In *Fowler* v. *Padget* (5) it was held that a debtor leaving his house did not commit an act of bankruptcy, though creditors were delayed, unless there was an intention to delay, and Lord Kenyon observed, "It is a principle of natural justice and of our law, that actus non facit reum nisi mens sit rea. The intent and the act must both concur to constitute the crime." In *Reg.* v. *Sleep* (6) in which an indictment was laid under 9 & 10 Wm. 3, c. 41, s. 2, for having been in possession of naval stores, and the jury negatived that the prisoner knew that the stores were marked with the broad arrow, Cockburn, C.J., said, "It is a principle of our law that to constitute an offence there must be a guilty mind, and that principle must be imported into the statute, although the Act itself does not in terms make a guilty mind necessary to the commission of the offence." *Reg.* v. *Dodsworth* (7), and *Reg.* v. *Allday* (8), are to the same effect. In *Buckmaster* v. *Reynolds* (9), Erle, C.J., says, "A man cannot be said to be guilty of a delict unless to some extent his mind goes with the act. Here it seems that the respondent acted on the belief that he had a right to enter the room, and that he had no intention to do a wrongful act."

(1) 20 St. Tr. at p. 919; 5 Burr. at pp. 2666-7.
(2) 2 Camp. at p. 404.
(3) 3 T. R. 430, n.
(4) 14 St. Tr. at p. 1125.
(5) 7 T. R. 509, 514.
(6) Leigh and Cave, 44, 54; 30 L. J. (M.C.) 170, 173.
(7) 2 Mood. & Rob. 72.
(8) 8 C. & P. 136.
(9) 13 C. B. (N.S.) 62, 68.

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The mere use of obscene words, or the occurrence of obscene passages, does not make the work obscene. Thus Milton, in his celebrated defence of himself (1), justifies by examples the use of language adequate to the occasion, though it may be obscene. On this principle it is that the defence of unlicensed printing has always been based. The opposite principle is that of the Church of Rome. Thus in Hallam's Literature of Europe, part ii., c. 8, s. 70, it is said, "Rome struck a fatal blow at literature in the index expurgatorius of prohibited books. . . . The first list of books prohibited by the church was set forth by Paul IV. in 1559. His index includes all bibles in modern languages, enumerating forty-eight editions, chiefly printed in countries still within the obedience of the church." If mere obscenity, without reference to the object, is indictable, Collier's View of the Immorality of the English Stage, written with the best motives and published with the best results, would have been indictable. The same may be said of David Clarkson's works, just now republished in Edinburgh, with a preface by Dr. Miller. What can be more obscene than many pictures publicly exhibited, as the Venus in the Dulwich gallery?

[LUSH, J. It does not follow that because such a picture is exhibited in a public gallery, that photographs of it might be sold in the streets with impunity.]

What can be more obscene than Bayle's Dictionary, or many of the works of the standard authors in English poetry, from Chaucer to Byron?—Dryden's translation, for instance, of the sixth satire of Juvenal? Or Savage's St. Valentine's Day? And yet of Savage, the great moralist Dr. Johnson (2), says, alluding to the attempt to prosecute him in the King's Bench for his "Progress of a Divine," as being an obscene libel: "It was urged in his defence, that obscenity was criminal when it was intended to promote the practice of vice; but that Mr. Savage had only introduced obscene ideas with the view of exposing them to detestation, and of amending the age by showing the deformity of wickedness. This plea was admitted, and Sir Philip Yorke, who then presided in that court, dismissed the information, with encomiums upon the purity and excellence of Mr. Savage's writings." So here, the

(1) Probably Authoris pro se defensio contra Alexandrum Morum.

(2) Lives of the English Poets.

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object of the compiler, as expressed in his preface and his comments throughout the pamphlet, is to expose the obscenity and grossness of the Romish practice of the confessional. In *Murray* v. *Benbow* (1) shortly noticed with other cases in Phillips on Copyright, pp. 23–25, Lord Eldon, C., refused an injunction to restrain the sale of a pirated edition of Lord Byron's Cain, on the ground that it was a profane libel. Lord Eldon's judgment is given in the prefatory notes to Cain in the collected editions of Byron's works by Moore. And the learned judge expressly puts the distinction of the author's motive. Thus, alluding to Paradise Lost and Regained, he says: "It appears to me that the great object of the author was to promote the cause of Christianity. There are undoubtedly a great many passages in it, of which, if that were not the object, it would be very improper by law to vindicate the publication; but, taking it altogether, it is clear that the object and effect was not to bring discredit, but to promote the reverence of our religion."

[BLACKBURN, J. "Object and effect:" consider the object here to be good, what was the effect?]

Starkie, in his Law of Slander and Libel, vol. ii., p. 147, 2nd edit., treating of blasphemy as a crime, says: "A malicious and mischievous intention, or what is equivalent to such an intention in law, as well as morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even to weaken man's sense of religious or moral obligations, to insult those who believe by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete."

[BLACKBURN, J. The argument to meet the present case must go the length, that the object being good, or at all events innocent, would justify the publication of anything however indecent, however obscene, and however mischievous.

(1) Jac. 474, n.

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LORD J. And by any means such as giving away obscene extracts like these as tracts.

CHAMBRE, C.J. A medical treatise, with Engravings necessary for the information of those for whose education or advancement the work is intended, may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for any one, boys and girls, to see as they pass. The immunity must depend upon the circumstances of the publication.]

The witness must always be looked to. Thus in Mawbey's Case (1), which was a prosecution of the publisher of Shelley's works for blasphemy, Lord Denman, C.J., in summing up, is reported to have said: "The purpose of the passage cited from 'Queen Mab' was, he thought, to cast reproach and insult upon what in Christian minds were the peculiar objects of veneration. It was not, however, sufficient that mere passages of such an obscene character should exist in a work in order to render the publication of it an act of criminality. It must appear that no condemnation of such passages appeared in the context." Such condemnation has appeared in page after page of this pamphlet. Likewise, Mr. Justice Bayley recognised the right of every one to attack the errors of any sort of religion. In Gathercole's Case (2), that learned Judge told the jury: "A person may, without being liable to prosecution for it, attack Infidels, Mahommedanism, or even any sect of the Christian religion, except the established religion of the country! . . . . The defendant here has a right to entertain his opinions, to express them, and to discuss the subject of the Roman Catholic religion and its institutions." Lord Mansfield expressed himself to the same effect in a speech in the House of Lords, which is cited by Lord Campbell in his life of Lord Mansfield. (3)

(1) 1 Mod. St. Tr. by Townsend, p. 253.

(2) 2 Carrie's C. C., at p. 262.

(3) "Discussions concerning doctrines, how far Christ hath been understood by some, or perverted by others, in which every one is entitled to the utmost freedom of opinion, and the right of answering, has never been disputed. But the writings now before the court are not of that nature; they are gross abuse, ribaldry, and railing, to which nothing can give countenance or excuse. For although every man has a right to his own opinions, and to the free exercise of private worship, according to the dictates of his own conscience, yet he has no right to revile and abuse the religion of his country, or to insult and ridicule the religious opinions of others." Life of Lord Mansfield, vol. iii. pp. 252-54. Life of

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The 20 & 21 Vict. c. 83, s. 1, does not make the mere possession or sale of an obscene work sufficient, and the question is therefore quo animo was the publication; and the mere committing of the act is not sufficient, as in 3 & 4 Wm. 4, c. 15, s. 2, or 5 & 6 Vict. c. 93, s. 3. Here the publication of this pamphlet, though obscene, was with an honest intention of exposing the Roman Confessional, an object honestly carried out by correct quotations of the original Latin, correctly translated. The recorder has found that this was the intention, and he therefore righly decided that the publication was not a misdemeanor.

A. S. Hill, Q.C., for the respondents. The preamble of the statute, taken with the enacting part, shows what the intention of the legislature was, and the question is whether the pamphlet was of such a character as to make the publication of it a misdemeanor.

[COCKBURN, C.J. The section says, "for the purposes of gain."]

The word "gain" does not occur in the clause, "for the purpose of sale or distribution." If the work be of an obscene character, it may be questioned whether intention has anything to do with the matter. But, if intention is necessary, it must be inferred that the appellant intended the natural consequences of his act, which the recorder finds are to prejudice good morals, and the motive of such a publication cannot justify it. Thus, an indictment lies for carrying a child with an infectious disease in the public streets, though there was no intention to do injury to the passengers: *Rex* v. *Vantandillo.* (1) In *Rex* v. *Topham* (2), Lord Kenyon says: "It was argued, that even supposing there was sufficient evidence of publication, there was no evidence of a criminal intent in the defendant. To this I can answer in the words of

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Lord Mansfield.—The case is that of *Harrison* v. *Evans* (3 Br. Parl. C. 465), and was an action of debt for penalties commenced in the Sheriff's Court against Evans for not serving the office of sheriff, which he refused, on account of being a dissenter, and not having received the sacrament according to the rites of the Church of England within a year before his election. The extracts from Lord Mansfield's speech in the House of Lords, that are quoted by Lord Campbell, are from the speech as given by Dr. Philip Furneaux (not Faraceaux as printed in Campbell's Lives) in an appendix to the second edition of "Letters to Mr. Justice Blackstone concerning his Exposition of the Act of Toleration." London, Cadell, 1771; see pp. 277-8.

(1) 4 M. & S. 73.

(2) 4 T. R. at p. 127.

Lord Mansfield in *Rex* v. *Woodfall* (1), that 'where the act is in itself unlawful (as in this case), the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent;'" and this passage is again cited with approbation by Lord Ellenborough in *Rex* v. *Phillips*. (2)

[BLACKBURN, J. Lord Ellenborough propounded the same principle in *Rex* v. *Dixon*. (3)]

The ruling of Alderson B., in *Gathercole's Case* (4), part of which was cited for the appellant, is also in point. "This indictment charges the defendant with intending to injure the character of the prosecutors; and every man, if he be a rational man, must be considered to intend that which must necessarily follow from what he does." In Starkie, on Slander and Libel, vol. ii. p. 158, 2nd ed., it is said, "Ever since the decision in *Curl's Case* (5), it seems to have been settled, that any publication tending to the destruction of the morals of society is punishable by indictment. . . . Although many vicious and immoral acts are not indictable, yet, if they tend to the destruction of morality in general, if they do or may affect the mass of society, they become offences of a public nature." *Reg.* v. *Read* (6) was to the contrary; it was there held that an indictment would not lie for publishing an obscene libel, unless it libelled some one; and the note added by Fortescue is remarkable, and much in point. "N.B. There was the case of the *King* v. *Curl* in B. R., which was an indictment for printing and publishing a libel called *The Nun in her Smock*, which contained several bawdy expressions, but did contain no libel against any person whatsoever; the Court gave judgment against the defendant, but contrary to my opinion; and I quoted this case. And, indeed, I thought it rather to be published on purpose to expose the Romish priests, the father confessors, and the popish religion.",

[The Court then adjourned; on the Judges' return into court.]

COCKBURN, C.J. We have considered this matter, and we are of opinion that the judgment of the learned recorder must be reversed,

(1) 5 Burr. at p. 2667.
(2) 6 East, at p. 473.
(3) 3 M. & S. 11, 15.
(4) 2 Lewin's C. C. at p. 255.
(5) 2 Strange, 788.
(6) Fort. 98, 100.

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and the decision of the magistrates affirmed. This was a proceeding under 20 & 21 Vict. c. 83, s. 1, whereby it is provided that, in respect of obscene books, &c., kept to be sold or distributed, magistrates may order the seizure and condemnation of such works, in case they are of opinion that the publication of them would have been the subject-matter of an indictment at law, and that such a prosecution ought to have been instituted. Now, it is found here as a fact that the work which is the subject-matter of the present proceeding was, to a considerable extent, an obscene publication, and, by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come. The magistrates must have been of opinion that the work was indictable, and that the publication of it was a fit and proper subject for indictment. We must take the latter finding of the magistrates to have been adopted by the learned recorder when he reversed their decision, because it is not upon that ground that he reversed it; he leaves that ground untouched, but he reversed the magistrates' decision upon the ground that, although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the information, yet that the immediate intention of the appellant was not so to affect the public mind, but to expose the practices and errors of the confessional system in the Roman Catholic Church. Now, we must take it, upon the finding of the recorder, that such was the motive of the appellant in distributing this publication; that his intention was honestly and bonâ fide to expose the errors and practices of the Roman Catholic Church in the matter of confession; and upon that ground of motive the recorder thought an indictment could not have been sustained, inasmuch as to the maintenance of the indictment it would have been necessary that the intention should be alleged and proved, namely, that of corrupting the public mind by the obscene matter in question. In that respect I differ from the recorder. I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character. It is quite clear that the publishing an obscene

book is an offence against the law of the land. It is perfectly true, as has been pointed out by Mr. Kydd, that there are a great many publications of high repute in the literary productions of this country the tendency of which is immodest, and, if you please, immoral, and possibly there might have been subject-matter for indictment in many of the works which have been referred to. But it is not to be said, because there are in many standard and established works objectionable passages, that therefore the law is not as alleged on the part of this prosecution, namely, that obscene works are the subject-matter of indictment; and I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character. The very reason why this work is put forward to expose the practices of the Roman Catholic confessional is the tendency of questions, involving practices and propensities of a certain description, to do mischief to the minds of those to whom such questions are addressed, by suggesting thoughts and desires which otherwise would not have occurred to their minds. If that be the case as between the priest and the person confessing, it manifestly must equally be so when the whole is put into the shape of a series of paragraphs, one following upon another, each involving some impure practices, some of them of the most filthy and disgusting and unnatural description it is possible to imagine. I take it therefore, that, apart from the ulterior object which the publisher of this work had in view, the work itself is, in every sense of the term, an obscene publication, and that, consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But, then, it is said for the appellant, "Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion especially in the matter of the confessional." Be it so. The question then presents itself in this simple form: May you commit an offence against the law in order that thereby you may effect

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some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no. The law says, you shall not publish an obscene work. An obscene work is here published, and a work the obscenity of which is so clear and decided, that it is impossible to suppose that the man who published it must not have known and seen that the effect upon the minds of many of those into whose hands it would come would be of a mischievous and demoralizing character. Is he justified in doing that which clearly would be wrong, legally as well as morally, because he thinks that some greater good may be accomplished? In order to prevent the spread and progress of Catholicism in this country, or possibly to extirpate it in another, and to prevent the state from affording any assistance to the Roman Catholic Church in Ireland, is he justified in doing that which has necessarily the immediate tendency of demoralizing the public mind wherever this publication is circulated? It seems to me that to adopt the affirmative of that proposition would be to uphold something which, in my sense of what is right and wrong, would be very reprehensible. It appears to me the only good that is to be accomplished is of the most uncertain character. This work, I am told, is sold at the corners of streets, and in all directions, and of course it falls into the hands of persons of all classes, young and old, and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it contains. And for what? To prevent them, it is said, from becoming Roman Catholics, when the probability is, that nine hundred and ninety-nine out of every thousand into whose hands this work would fall would never be exposed to the chance of being converted to the Roman Catholic religion. It seems to me that the effect of this work is mischievous and against the law, and is not to be justified because the immediate object of the publication is not to deprave the public mind, but, it may be, to destroy and extirpate Roman Catholicism. I think the old sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals; and here we have a certain and positive evil produced for the purpose of effecting an uncertain, remote, and very doubtful good. I think, therefore, the case for the order is made out, and although I quite concur in thinking that the

motive of the parties who published this work, however mistaken, was an honest one, yet I cannot suppose but what they had that intention which constitutes the criminality of the act, at any rate that they knew perfectly well that this work must have the tendency which, in point of law, makes it an obscene publication, namely, the tendency to corrupt the minds and morals of those into whose hands it might come. The mischief of it, I think, cannot be exaggerated. But it is not upon that I take my stand in the judgment I pronounce. I am of opinion, as the learned recorder has found, that this is an obscene publication. I hold that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, quoad the intention and quoad the act, it does not lie in the mouth of the man who does it to say, "Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose." The law does not allow that; you must abide by the law, and if you would accomplish your object, you must do it in a legal manner, or let it alone; you must not do it in a manner which is illegal. I think, therefore, that the recorder's judgment must be reversed, and the order must stand.

BLACKBURN, J. I am of the same opinion. The question arises under the 20 & 21 Vict. c. 83, an act for "the more effectually preventing the sale of obscene books," and so forth; and the provision in the first section is this:—[The learned judge read the section.] Now, what the magistrate or justices are to be satisfied of is that the belief of the complainant is well founded, and also "that any of such articles so published for any of the purposes aforesaid, are of such a character and description," that is to say of such an obscene character and description, that the publication of them would be a misdemeanor, and that the publication in the manner alleged would be proper to be prosecuted; and having satisfied themselves in respect of those things, the magistrates may proceed to order the seizure of the works. And then the justices in petty sessions are also in effect to be satisfied of the same three things; first, that the articles complained of have been kept for any of the purposes aforesaid, and that they are of the character

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stated in the warrant, that is, that they are of such a character that it would be a misdemeanor to publish them; and that it would not only be a misdemeanor to publish them, but that it would be proper to be prosecuted as such; and then, and then only, are they to order them to be destroyed. I think with respect to the last clause, that the object of the legislature was to guard against the vexatious prosecution of publishers of old and recognized standard works, in which there may be some obscene or mischievous matter. In the case of *Reg.* v. *Moxon* (1), and in many of the instances cited by Mr. Kydd, a book had been published which, in its nature, was such as to be called obscene or mischievous, and it might be held to be a misdemeanor to publish it; and on that account an indictable offence. In *Moxon's Case* (1), the publication of Shelley's "Queen Mab" was found by the jury to be an indictable offence; I hope I may not be understood to agree with what the jury found, that the publication of "Queen Mab" was sufficient to make it an indictable offence. I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance. So whether the publication of the whole works of Dryden is or is not a misdemeanor, it would not be a case in which a prosecution would be proper; and I think the legislature put in that provision in order to prevent proceedings in such cases. It appears that the work in question was published, and the magistrates in petty sessions were satisfied that it was a proper subject for indictment, and their finding as to that accords with the view we entertain. Then there was an appeal to the recorder in quarter sessions to reverse their decision, which appeal was successful. The learned recorder, in stating the grounds on which he reversed their decision, says, "About one half of the pamphlet relates to casuistical and controversial questions which are not obscene, but the latter half of the pamphlet is obscene in fact, as containing passages which relate to impure and filthy acts, words and ideas. The appellant did not keep or sell the pamphlets for purposes of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he kept and sold the pamphlet as a member of the Protestant Electoral Union, to promote the

(1) 2 Mod. S. Tr. 356.

objects of that society, and to expose what he deemed to be errors in the church of Rome, and particularly the immorality of the confessional." The recorder then says he was of opinion that the sale and distribution of the pamphlet would not be a misdemeanor, nor consequently be proper to be prosecuted as such, and upon that ground he quashed the magistrates' order, leaving to this Court the question whether he was right or not. Upon that I understand the recorder to find the facts as follows: He finds that one half of the book was in fact obscene, and he finds that the effect of it would be such, that the sale and circulation of it was calculated to prejudice good morals. He does not find that he differs from the justices at all in matter of fact as to that, but he finds that the publication would not be indictable at all as a misdemeanor, and consequently that it would not be proper to prosecute it as a misdemeanor; and his reason for thinking it was not indictable as a misdemeanor is this, that the object of the person publishing was not to injure public morality, but with a view to expose the errors of the Church of Rome, and particularly the immorality, as he thought it, of the confessional; and, consequently upon those grounds, the recorder held it was not indictable. Then comes the question whether, upon those grounds, the publication was not indictable, and I come to the conclusion that the recorder was wrong, and that it would be indictable. I take the rule of law to be, as stated by Lord Ellenborough in *Rex* v. *Dixon* (1), in the shortest and clearest manner: "It is a universal principle that when a man is charged with doing an act" (that is a wrongful act, without any legal justification) "of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act." And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act. If he does an act which is illegal, it does not make it legal that he did it with some other object. That is not a legal excuse, unless the object was such as under the circumstances rendered the particular act lawful. That is illustrated by the same case of *Rex* v. *Dixon*. (2) The question in that particular case was, whether or not an indictment would lie against a man who unlawfully and wrongfully gave to

(1) 3 M. & S. at p. 15. (2) 3 M. & S. 11.

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children unwholesome bread, but without intent to do them harm. The defendant was a contractor to supply bread to a military asylum, and he supplied the children with bread which was unwholesome and deleterious, and although it was not shewn or suggested that he intended to make the children suffer, yet Lord Ellenborough held that it was quite sufficient that he had done an unlawful act in giving them bread which was deleterious, and that an indictment could be sustained, as he must be taken to intend the natural consequences of his act. So in the case in which a person carried a child which was suffering from a contagious disease, along the public road to the danger of the health of all those who happened to be in that road, it was held to be a misdemeanor, without its being alleged that the defendant intended that anybody should catch the disease: *Rex* v. *Vantandillo.* (1) Lord Ellenborough said that if there had been any necessity, as supposed, for the defendant's conduct, this would have been matter of defence. If, on the other hand, the small-pox hospital were on fire, and a person in endeavouring to save the infected inmates from the flames, took some of them into the crowd, although some of the crowd would be liable to catch the small-pox, yet, in that case, he would not be guilty of a wrongful act, and he does not do it with a wrong intention, and he would have a good defence, as Lord Ellenborough said, under not guilty. To apply that to the present case, the recorder has found that one half of this book is obscene, and nobody who looks at the pamphlet can for a moment doubt that really one half of it is obscene, and that the indiscriminate circulation of it in the way in which it appears to have been circulated, must be calculated necessarily to prejudice the morals of the people. The object was to produce the effect of exposing and attacking the Roman Catholic religion, or practices rather, and particularly the Roman Catholic confessional, and it was not intended to injure public morals; but that in itself would be no excuse whatever for the illegal act. The occasion of the publication of libellous matter is never irrelevant, and is for the jury, and the jury have to consider, taking into view the occasion on which matter is written which might injure another, is it a fair and proper comment, or is it not more injurious than the circum-

(1) 4 M. & S. 73.

stances warranted? But on the other hand it has never been held that the occasion being lawful can justify any libel, however gross. I do not say there is anything illegal in taking the view that the Roman Catholics are not right. Any Protestant may say that without saying anything illegal. Any Roman Catholic may say, if he pleases, that Protestants are altogether wrong, and that Roman Catholics are right. There is nothing illegal in that. But I think it never can be said that in order to enforce your views, you may do something contrary to public morality; that you are at liberty to publish obscene publications, and distribute them amongst every one—schoolboys and every one else—when the inevitable effect must be to injure public morality, on the ground that you have an innocent object in view, that is to say, that of attacking the Roman Catholic religion, which you have a right to do. It seems to me that never could be made a defence to an act of this sort, which is in fact a public nuisance. If the thing is an obscene publication, then, notwithstanding that the wish was, not to injure public morality, but merely to attack the Roman Catholic religion and practices, still I think it would be an indictable offence. The question, no doubt, would be a question for the jury; but I do not think you could so construe this statute as to say, that whenever there is a wrongful act of this sort committed, you must take into consideration the intention and object of the party in committing it, and if these are laudable, that that would deprive the justices of jurisdiction. The justices must themselves be satisfied that the publication, such as the publication before them, would be a misdemeanor on account of its obscenity, and that it would be proper to indict. The recorder has found that the pamphlet is obscene, and he supports the justices in every finding, except in what he has reversed it upon. He finds the object of the appellant in publishing the work was not to prejudice good morals, and consequently he thinks it would not be indictable at all. But I do not understand him for a moment to say, that if he had not thought there was a legal object in view, it would not have been a misdemeanor at all, and that therefore it would have been vexatious or improper to indict it; nor do I think that anybody who looks at this book would for a moment have a doubt upon the matter. That being so, on the question of

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whether or not on the facts that the recorder has found it would be a misdemeanor and indictable as such, I come to the conclusion that it is a misdemeanor, and that an indictment would lie; and I say the justices were right, and consequently the recorder's decision is reversed, and the order of justices is confirmed.

MELLOR, J. I confess I have with some difficulty, and with some hesitation, arrived very much at the conclusion at which my Lord and my learned Brothers have arrived. My difficulty was mainly, whether or not this publication was, under the finding of the recorder, within the act having reference to obscene publications. I am not certainly in a condition to dissent from the view which my Lord and my Brothers have taken as to the recorder's finding, and if that view be correct then I agree with what has been said by my Lord and my Brother Blackburn. The nature of the subject itself, if it may be discussed at all (and I think it undoubtedly may), is such that it cannot be discussed without to a certain extent producing authorities for the assertion that the confessional would be a mischievous thing to be introduced into this kingdom; and therefore it appears to me very much a question of degree, and if the matter were left to the jury it would depend very much on the opinion which the jury might form of that degree in such a publication as the present. Now, I take it for granted that the magistrates themselves were perfectly satisfied that this work went far beyond anything which was necessary or legitimate for the purpose of attacking the confessional. I take it that the finding of the recorder is (as I suppose was the finding of the justices below) that though one half of the book consists of casuistical and controversial questions, and so on, and which may be discussed very well without detriment to public morals, yet that the other half consists of quotations which are detrimental to public morals. On looking at this book myself, I cannot question the finding either of the recorder or of the justices. It does appear to me that there is a great deal here which there cannot be any necessity for in any legitimate argument on the confessional and the like, and agreeing in that view, I certainly am not in a condition to dissent from my Lord and my Brother Blackburn, and I know my Brother Lush agrees entirely with their opinion. Therefore, with the expression

of hesitation I have mentioned, I agree in the result at which they have arrived.

LUSH, J. I agree entirely in the result at which the rest of the Court have arrived, and I adopt the arguments and the reasonings of my Lord Chief Justice and my Brother Blackburn.

Order of justices affirmed.

Attorney for appellant: *C. Bassett.*
Attorney for respondents: *Needham.*

WOOD *v.* SLACK.

May 1.

Debtor and Creditor—Composition Deed under Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192.—*Alteration in Deed after Registration.*

A deed under s. 192 of the Bankruptcy Act, 1861, was expressed to be made between the debtor and certain persons named in the schedule as creditors, and all other the creditors of the defendant, and was executed by a majority in number, representing three-fourths in value of the debtor's creditors, and was then registered; after registration, the names of two additional creditors of the debtor were inserted in the schedule:—

Held, that there was no material alteration of the deed, and, that as the requisite number had assented before registration, the insertion of the names of the two creditors after registration did not affect the validity of the deed.

THE first and second counts were by the plaintiff as drawer, against the defendant as acceptor, of two several bills of exchange. The residue of the declaration was for goods bargained and sold, goods sold and delivered, for interest, and on accounts stated.

Plea, upon equitable grounds, that by a deed made between the defendant of the first part, and the several other persons named in the schedule thereto as creditors, and all other the creditors, if any, of the defendant, of the second part, the defendant covenanted to pay to the parties of the second part, and all other the creditors of him the defendant five shillings in the pound on their debts, by three instalments, and it was declared that the same was accepted by the parties of the second part, and all other creditors of the defendant, in full satisfaction and discharge of all claims, dues, and demands, in respect of their debts, and that the deed

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should operate as fully and effectually as an order of discharge under the Bankruptcy Act, 1861, and might be pleaded in bar to any claim in respect of any such debt: the plea then set out the schedule, and averred that the deed having the said schedule annexed thereto, was first executed by the defendant, and was before the registration thereof by all the creditors of the defendant, whose names appear in the schedule, except Benjamin Idle, and Ellis, and Newsome, being the majority in number representing three-fourths in value of the defendant's creditors, whose debts respectively amounted to 10*l.* and upwards, executed. The plea contained the necessary averments to make the deed binding on the defendant's creditors, and alleged that Idle, Ellis, and Newsome, being respectively creditors of the defendant in the amounts respectively mentioned in the schedule, did after the registration of the deed insert their names in the schedule, and executed the deed in order to express their assent to, and in approbation of the provisions thereof, and not by way of altering or giving any additional effect or operation to the deed.

Replication: That after the making of the deed and after the registration thereof, and while the deed was in the possession or custody of the defendant, the same was altered in a material part without the consent of the plaintiff, namely, by the insertion in the schedule, the schedule being part of the deed, of the name of Benjamin Idle as a creditor of the defendant, and of the style of the firm of Ellis and Newsome as creditors of the defendant, and that there is nothing in the deed to indicate that the names were inserted in the schedule, or that the deed was executed by them in order to express their assent to, and their approbation of, the provisions of the deed, and not by way of altering or giving any additional effect or operation thereto.

Demurrer to the plea, and demurrer to the replication.

Forbes, for the plaintiff. The alteration is a material one, and avoids the deed. Assuming that a debt once released would not revive by the subsequent alteration or destruction of the deed, there is no release in the present case, but only a covenant not to sue so long as the instalments are paid. In *Sellin* v. *Price* (1), it was held that the annexation of a schedule to a composition

(1) Law Rep. 2 Ex. 189.

deed after registration, the schedule having thus become part of the deed itself, was an alteration in a material part and made it void; here the annexation of two names unto the schedule after registration, was the annexation of part of a schedule and made the deed void; no sound distinction can be drawn between annexing the whole or part of a schedule only. Further, the insertion of the names was material, because there was no admission at the time of the registration that the persons whose names were inserted were creditors, and the debtor might have required them to prove that fact and the amount of their debts in the usual way. The insertion of their names in the schedule estopped the debtor from disputing that they were creditors for the amounts placed opposite their names: *Ex parte Cockburn.* (1) The creditors rely for payment of the composition simply upon the debtor's covenant, there is no trustee to protect their rights, and, as the debtor's admission that the two persons who have signed since the registration are creditors, diminishes the other creditors' chance of payment, the statutory majority might not have assented if the names had been subscribed before the execution and registration of the deed.

C. Hutton, contrà. The insertion of the names of the two creditors in the schedule is not a material alteration, as after registration it cannot affect the validity of the deed. The creditors, as the consideration for executing the deed, accept the covenant of the debtor to pay 5*s.* in the pound, and the moment the deed is registered it amounts to a statutory release, and if the composition is not paid every creditor has his remedy on the covenant, how then can the fact that two of the creditors, who, though not assenting creditors, yet were bound by the deed, executed the deed after registration, affect the rights of the creditors to sue on the covenant? The assets of the debtor's estate are not in any way affected. The plea also states that the names of the two creditors were not inserted in the schedule until after the deed was a good and binding deed under s. 192 of the Bankruptcy Act, 1861.

Forbes, in reply.

COCKBURN, C.J. I think the insertion of the names of the two

(1) 33 L. J. (Bkr.) 17. 10 Jur. N. S. 573. 3 Law J. R. 175.

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creditors in the schedule after the registration is not a substantial alteration of the deed so as to vitiate it. The object of the deed which is made between the debtor and his creditors is to pay all his creditors a composition of 5*s.* in the pound; these two creditors instead of executing the deed as they might have done, have, after the registration of the deed, inserted their names in the schedule. That is an immaterial alteration of the deed. If the debtor had not obtained the requisite number of creditors to make the deed a good deed it would be a different matter, but that is not the case here, and no one is prejudiced by what has been done.

BLACKBURN, J. I am of the same opinion. Looking at all the circumstances of this case, I think the alteration is not material. The deed is made between the defendant, the debtor, of the first part, and the several other persons named in the schedule as creditors and all other the creditors, if any, of the debtor, of the second part. Exclusive of the names of the two creditors who subsequently signed the schedule, the deed was executed by the requisite majority so as to make it a binding deed on the creditors, and it was then registered. At the time it was registered, it was as binding on the two creditors who subsequently signed as if they had at the first executed it. Whether they had assented to the deed or not, they were equally bound by it. That being so, they insert their names in the schedule; they were bound before they did so, and they are bound subsequently to their having done so. I am at a loss to conceive how the supposed alteration can be prejudicial to any one. The alteration clearly is not material. The effect of the deed is exactly what it was before the alteration: *Sellin* v. *Price* (1) is a very different case. There the Court said (2) that "inasmuch as the schedule purporting to have been annexed to the deed was not annexed to it until long after its execution and registration, and neither that schedule nor any paper containing the assent in writing of any creditors is before the Court at all, we are left in doubt whether some of the requisite assents may not have been given by the schedule, and are therefore not satisfied that they were given in due time, and we must therefore hold the deed upon this ground to be invalid," and secondly, the Court were of opinion that

(1) Law Rep. 2 Ex. 189. (2) Law Rep. 2 Ex. at p. 192.

the annexation of the schedule to the deed after execution and registration altered the deed in a material particular and made it void. But those reasons do not apply to the present case. When the deed was registered, it was as much binding upon the two creditors before as it was after their names were inserted in the schedule.

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HANNEN, J., concurred.

Judgment for the defendant.

Attorney for plaintiff: *Unwin.*
Attorney for defendant: *P. H. Lawrence.*

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF THE PARISH OF ALDERSHOT, APPELLANTS, *v.* THE GUARDIANS OF THE MEDWAY UNION, RESPONDENTS.

May 9.

Pauper Lunatic—Order of Settlement of—Right of Appeal—Parties—16 & 17 *Vict. c.* 97, *s.* 108; 24 & 25 *Vict. c.* 55, *ss.* 6, 7.

By 16 & 17 Vict. c. 97, s. 108, if the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any order adjudging the settlement of any pauper in a lunatic asylum, they may appeal against it. By 24 & 25 Vict. c. 55, s. 6, the maintenance of a pauper lunatic in an asylum is to be borne by the common fund of the union; and by s. 7, the guardians of any union may obtain orders upon the guardians of any other union, or upon the guardians or overseers of any parish not comprised in a union, and may appeal against and defend any orders in respect of any lunatic paupers hereby made chargeable upon the common fund. . . .

The guardians of M. Union obtained an order adjudging the settlement of a pauper in a lunatic asylum to be in the parish of A., in the F. Union, and the guardians of F. Union were ordered to pay the expenses of the removal of the lunatic and of his maintenance in the asylum. The overseers of the parish of A. appealed against the order:—

Held, that ss. 6 and 7 of 24 & 25 Vict. c. 55, did not repeal s. 108 of 16 & 17 Vict. c. 97; and that the overseers of A. had a right of appeal against the order, as they might still be aggrieved by an order adjudging the settlement of a pauper to be in their parish, though his maintenance while in the lunatic asylum was thrown on the common fund of the union.

ON an appeal to the Kent Quarter Sessions against an order adjudging the settlement of one H. Wilson, a pauper lunatic, the sessions quashed the order, subject to the following case:—

The order appealed against was made by two justices of Kent,

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and was directed to the guardians of the Medway Union, the respondents, and to the guardians of the Farnham Union, whereby the justices did adjudge the last legal settlement of Henry Wilson, then confined in the lunatic asylum at Barming Heath, in the county of Kent, to be in the parish of Aldershot, in the Farnham Union, and whereby the justices did order the guardians of the Farnham Union to pay to the respondents certain sums which had been expended by the respondents as in the order mentioned, and also weekly and every week from the date of the order to pay to the treasurer of the asylum a certain further sum, as in the order is set forth.

A copy or duplicate of the order, together with the statements required by the statute 16 & 17 Vict. c. 79, s. 107, setting forth the grounds of adjudication, including the particulars of the settlement relied on in support thereof, and addressed to the guardians of the Farnham Union, and to the overseers of the parish of Aldershot, was sent by the respondents to the guardians and overseers respectively.

Against this order, the overseers of Aldershot entered an appeal to the above-named sessions.

Upon the appeal coming on to be heard, it was objected on the part of the respondents that the appeal ought to have been brought by the guardians of the Farnham Union, and not by the overseers of Aldershot, and it was contended that the overseers had no right to appeal against the order, inasmuch as they were not parties to the order or proceedings before the justices, and the expenses of maintaining the lunatic were under the statute 24 & 25 Vict. c. 55, ss. 6, 7 (1), thrown upon the common fund of the Farnham poor law union.

(1) 24 & 25 Vict. c. 55, s. 6:—"The cost of the examination of any lunatic pauper, present or future, of his removal to and from, and his maintenance in any asylum, licensed house, or registered hospital, who would under any provision of the 16 & 17 Vict. c. 97, be chargeable to a parish in a union, shall, from and after the 25th of March next, be borne by the common fund of the union comprising such parish."

Section 7:—"The guardians of any union may obtain orders upon the guardians of any other union, or upon the guardians or overseers of any parish not comprised in a union, or upon the treasurer of the county, and may appeal against or defend any orders in respect of any lunatic paupers hereby made chargeable upon the common fund of the union, in like manner and subject to the same incidents and provisions as

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The Sessions overruled the objection, heard the appeal upon the merits, and quashed the order.

The question for the opinion of the Court was, whether the overseers of the parish of Aldershot had a right of appeal against the order.

Barrow and *Jephson*, for the appellants. The question is whether, since the passing of the 24 & 25 Vict. c. 55, s. 6, which provides that the expenses of the examination of a pauper lunatic and his maintenance in an asylum shall be borne by the common fund of the union, the overseers of a parish have a right of appeal against an order adjudging the settlement of a pauper lunatic to be in their parish. Section 97 of 16 & 17 Vict. c. 97, empowers the justices to inquire into the last legal settlement of a pauper lunatic and make an order adjudging the place of his settlement. By s. 108 it is enacted that if the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any such order, they may appeal against it. It has been decided in *Reg.* v. *Justices of West Riding* (1), that the overseers of a parish in which a lunatic pauper is adjudged to be settled have a right of appeal. But it will be contended that, as by s. 6 of 24 & 25 Vict. c. 55, the maintenance of the pauper lunatic is to be borne by the common fund, and by s. 7 the appeal is given to the guardians, the overseers are no longer parties aggrieved, and the right of appeal is taken away. This is a fallacy, the overseers are still aggrieved by the order, and may still appeal. The order made under s. 97 of 16 & 17 Vict. c. 97, adjudges the settlement of the pauper lunatic, and if this order remains unappealed against, it is conclusive as to the settlement of the pauper in the appellants' parish, and of all future derivative settlements. If the overseers could not appeal against the order, it would be binding on the parish at the option of the guardians. It is quite true the maintenance of the pauper is thrown on the common fund, but s. 108 of 16 & 17 Vict. c. 97, is not repealed by s. 7 of 24 & 25 Vict. c. 5. There is nothing

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are contained in the said last cited act in respect of lunatic paupers chargeable to any parish in such union: provided that every appeal now pending may be continued and determined as though this act had not been passed."

(1) 7 E. & B. 14; 26 L. J. (M.C.) 41.

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repugnant in these two enactments, and the right of appeal is not taken away by implication, and the law does not favour the repeal of a statute by implication: Dwarris on Statutes, 533.

Prentice, Q.C., and *Biron*, for the respondents. By s. 7 of 24 & 25 Vict. c. 55, the guardians of any union may obtain orders upon the guardians of any other union, and this order has been obtained by the Medway Union against the Farnham Union, and although the adjudication of the pauper's settlement is in the parish of Aldershot, the overseers of that parish cannot appeal because they are no parties to the order. Neither are they in any way aggrieved by the order. Section 6 shifts the chargeability, the parish is no longer burdened with the maintenance of the pauper, which is to be borne by the common fund; to that common fund all the parishes in the union contribute, and if Aldershot parish had a right of appeal, every other parish would have the same right. This order is not obtained at the instance of the overseers of the parish, but of the guardians of the union; the overseers of the parish are not parties to the order, and therefore it is not binding on them. The order cannot bind a person not a party to it. It is no estoppel or evidence of an admission against the overseers that the pauper was settled in their parish. Section 7 of 24 & 25 Vict. c. 55, under these circumstances, gives the right of appeal to the guardians of the union, and that section by implication repeals s. 108 of the former statute.

LUSH, J. I am of opinion that the Quarter Sessions were right in hearing this appeal. Under 16 & 17 Vict. c. 97, s. 108, according to the case of *Reg.* v. *Justices of West Riding* (1), the guardians of the union or the overseers of the parish had a right of appeal. The question is, is there anything in s. 7 of 24 & 25 Vict. c. 55, to take away that right? The effect of an order under the first act was to charge the expenses of a pauper lunatic on the parish to which he belonged; but now, under the later act, these expenses are to be borne by the common fund of the union. So far only is the effect of the order altered. The overseers of a parish may be aggrieved by the order adjudicating the settlement of the pauper lunatic to be in their parish, because the pauper's family might

(1) 7 E. & B. 14; 26 L. J. (M.C.) 41.

claim to be settled in their parish. It is said s. 7 of 24 & 25 Vict. c. 55, by implication, repeals s. 108 of 16 & 17 Vict. c. 97. I certainly do not see the necessity for s. 7, but the two enactments may well stand together. It would seem as if the framers of the later statute did suppose that the guardians of a union had no right of appeal; but s. 7 contains nothing inconsistent with s. 108 of 16 & 17 Vict. c. 97, and it has not the effect of repealing it by implication.

HANNEN, J., concurred.

Order of sessions affirmed.

Attorney for appellants: *Richard Eyre.*
Attorneys for respondents: *Nickinson, Pratt, & Nickinson.*

EX PARTE BEAL.

April 23.

Copyright in Works of the Fine Arts—25 & 26 Vict. c. 68, ss. 4, 6—Entry of Memorandum of Copyright—Description of the Nature and Subject of the Work—Conviction—Penalty.

By 25 & 26 Vict. c. 68, s. 4, the proprietor of copyright in paintings, drawings, and photographs, shall enter in a memorandum of the copyright, amongst other things, "a short description of the nature and subject of the work."

By s. 6, if any person, not being the proprietor for the time being, of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, or knowing that such repetition, copy, or other imitation, has been unlawfully made, shall sell . . . any copy . . . of the work, or of the design thereof, . . . such person, for every such offence, shall forfeit a sum not exceeding 10*l.*

G., being the proprietor of the copyright in two paintings in oil, and in a photograph, entered them under s. 4 thus:—"Painting in oil, 'Ordered on Foreign Service;' painting in oil, 'My First Sermon;' photograph, 'My Second Sermon.'" The first picture represented an officer taking leave of a lady; the second, a young child sitting in a pew apparently listening with her eyes wide open; the photograph represented the same child asleep in a pew. B. sold, on two several days, in two parcels, twenty-six photographic copies of these works, knowing them to have been unlawfully made. These copies had been made from engravings of the pictures, in which engravings G. also had the copyright. B. was convicted under s. 6 in a penalty for each copy sold:—

Held, that the nature and subject of the works were sufficiently described under

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s. 4; that to sell photographic copies of the engravings of a painting in which a person had a copyright, was an offence under s. 6; and that B. was properly convicted in a penalty in respect of each copy sold.

MOTION for a rule calling upon Sir R. W. Carden, an alderman and justice of the city of London, to shew cause why he should not state a case under 20 & 21 Vict. c. 43.

The applicant, S. B. Beal, was summoned to appear on the 24th of February, 1868, at the Guildhall justice room, in the city of London, to answer twenty-six complaints preferred by one Henry Graves under s. 6 of 25 & 26 Vict. c. 68. (1)

(1) 25 & 26 Vict. c. 68, s. 4:—"There shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of the act 5 & 6 Vict. c. 45, intituled, 'An Act to amend the Law of Copyright;' a book or books, entitled 'The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs,' wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto; and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work; and, in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this act until such registration; and no action shall be sustainable, nor any penalty be recoverable in respect of anything done before registration."

Section 6:—"If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation, has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence, shall forfeit to the proprietor of the copyright for the time being, a sum not exceeding 10*l.*; and all such repetitions, copies, and imitations, made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

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Fourteen of the complaints, as set forth in fourteen summonses, respectively alleged that the applicant "not being the proprietor of the undermentioned copyright on, &c., without the consent of the complainant, the proprietor of the copyright in a certain painting, and the design thereof, called "Ordered on Foreign Service," did unlawfully sell one copy of the same, knowing the same had been unlawfully made against the statute, &c.

Eight of the complaints, as set forth in eight of the summonses, respectively contained precisely similar allegations with respect to a painting called "My First Sermon."

Four of the complaints, as set forth in four of the summonses, respectively contained similar allegations, with the exception that they severally alleged that complainant was the proprietor of the copyright in a certain photograph, and the design thereof, called "My Second Sermon."

At the hearing it was proved that the complainant, H. Graves, was the proprietor of copyright in the two paintings "Ordered on Foreign Service," and "My First Sermon"; both pictures had been engraved, and Graves had also a copyright in the engravings; he was also the proprietor of the photograph from the engraving of the picture called "My Second Sermon," and the proprietor of the engraving of that picture. Certificates of registration were put in evidence which purported to be certified copies of the memorandum of copyright in the paintings "Ordered on Foreign Service," and "My First Sermon," and in the photograph of "My Second Sermon," required by the 25 & 26 Vict. c. 68, s. 4, to be entered in the register of proprietors of copyrights in paintings, drawings, and photographs. In such certificates the description of the nature and subject of the works was respectively as follows: "Painting in oil—'Ordered on Foreign Service.' Painting in oil—'My First Sermon.' Photograph—'My Second Sermon,'" and nothing more.

The picture "Ordered on Foreign Service," was an oil painting by R. Collinson, representing an officer in a railway carriage taking leave of a lady. "My First Sermon" was the well-known picture by J. E. Millais, representing a child sitting in a pew in church, with her eyes open, apparently listening. The photograph, "My Second Sermon," was from the engraving of the well-known picture by the same artist, representing the same child in church asleep.

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It was also proved that Beal had sold to one Clayton on the 31st of July a parcel of photographs containing (amongst others) four copies of "My First Sermon," seven copies of "Ordered on Foreign Service," and two copies of "My Second Sermon"; and that on the 12th of August Beal had sold to Clayton another parcel of photographs, containing (amongst others) seven copies of "Ordered on Foreign Service," two copies of "My Second Sermon," and four copies of "My First Sermon."

The photographs sold by Beal to Clayton were copies of the original design of the paintings, but were taken from impressions of engraved plates of the pictures.

It was objected on the part of the applicant, S. B. Beal, that the evidence did not shew a compliance with the requirements of s. 4 of 25 & 26 Vict. c. 68, and therefore that the complainant was not entitled to the benefit of the act; also, that inasmuch as the photographs which the applicant was charged with selling were proved to be copies of engravings, and not copies of a painting or photograph, he ought not to be convicted upon the complaints which charged him with selling copies of the paintings and photograph respectively; also, that upon the evidence given he ought not to be convicted in a penalty in respect of each copy, but at most in two penalties, there being only two sales or transactions of sale.

The justice convicted the applicant in a penalty of 5*l.* or one week's imprisonment on each of the complaints, making 130*l.* or six months imprisonment altogether. The applicant paid the 130*l.* under protest, and made an application to the justice to state and sign a case pursuant to s. 2 of 20 & 21 Vict. c. 43, but the justice being of opinion that the application was frivolous refused.

Francis, in support of the motion. First: The complainant has not complied with the requirements of s. 4. The subject of the work is not sufficiently described; there must be something more than the name of the picture, there must be such a description of the subject that any one may at once recognize the picture he is prohibited from copying; the section provides that the owner may register a sketch, outline, or photograph of the work. It is clear, therefore, that the intention of the legislature was that the memorandum registered should contain such a description of the subject

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as would clearly indicate to the public what the picture was. The same name by which the picture is designated might apply to other pictures besides the one intended, and if there is no other description a person might be misled and innocently violate the enactment. Secondly: The information charges the applicant with selling a copy of a painting; the evidence is, that he sold a photographic copy of an engraving, which is a different offence, and to which a different penalty is attached. The statutes which protect engravings are 8 Geo. 2, c. 13, the 7 Geo. 3, c. 38, and the 17 Geo. 3, c. 57.

[LUSH, J. Though the photograph is taken from the engraving it is a copy of the design of the picture.

BLACKBURN, J. If it were shewn that Graves had parted with the copyright of the engraving, then it might be a question whether Graves or the owner of the engraving could proceed against the applicant.]

Gambart v. *Ball* (1), is an authority that to copy an engraving by the process of photography is an offence under 7 Geo 3, c. 38.

[LUSH, J. It might be a question whether s. 6 does not mean that if a person should copy or repeat a painting by a painting, a drawing by a drawing, or a photograph by a photograph, he shall be guilty of an offence.]

Thirdly: There are only two sales; the applicant has committed only two offences, and is liable to two penalties only: *Brooke* v. *Milliken*. (2)

BLACKBURN, J. In this case three points have been raised for our decision, and there is also a fourth point which has been suggested by the Court. We have come to the conclusion that on none of them is there any reasonable doubt, and that we ought not to require a case to be stated.

The questions arise on the 25 & 26 Vict. c. 68, which gives a copyright to the authors of paintings, drawings, and photographs; by s. 4 a provision is made that the copyright shall be registered by entering in a book kept at the Hall of the Stationers' Company a memorandum of every copyright to which any person

(1) 14 C. B. (N.S.) 306; 32 L. J. (C. P.) 166. See also *Graves* v. *Ashford*, Law Rep. 2 C. P. 410.

(2) 3 T. R. 509.

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shall be entitled, and also of every subsequent assignment. And the memorandum is to contain, amongst other statements, a short description of the nature and subject of the work, and in addition thereto, if the person registering shall desire, a sketch, outline, or photograph of the work; and by s. 6 a penalty not exceeding 10*l.* is imposed if any person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall without the consent of the proprietor repeat, copy, colourably imitate, or otherwise multiply for sale, or knowing that any such repetition, copy, or other imitation has been unlawfully made, shall sell any repetition, copy, or imitation of the work, or of the design thereof.

The facts, as they appear in this case, are, that there are three well-known pictures, called "Ordered on Foreign Service," "My First Sermon," and "My Second Sermon." In all these pictures the copyright is in Mr. Graves, and has been registered. He complains that Beal has multiplied copies of each of these pictures. The first point made is, that merely stating the name of a picture is not a sufficient description of the nature and subject of the work. The nature of the work is that it is an oil painting; the subject of the work is stated to be in each case "Ordered on Foregn Service," "My First Sermon," "My Second Sermon;" it is said that this description renders the registration of the copyright invalid, and that it ought to be as precise as the registration of a specification of a patent, in order that all may know what it is that they are prohibited from copying. I think if the legislature intended this, it would have provided that the description of the subject should be such as to give information to persons who had never heard or known of the picture what it was that they have not to copy. I do not think that such specific information is necessary. In almost all cases, a man who copies a work without the authority of the owner, must know that he is pirating the work of somebody. There may be a conceivable case in which a man has been deceived, having been told by a person who pretended to be the owner of the copyright, that he might copy the picture. It is possible in such a case a man might have been acting innocently, but still he would be liable to a conviction and a nominal penalty. Further, if the information be laid for selling a copy, the statute

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requires proof that the person charged knew that the copy had been unlawfully made. It is, therefore, no objection that the registration does not give such a description of the work as may enable a person from it alone to ascertain whether he is about to sell the copy of a registered work, for that knowledge may be gained from other sources, and the object of the legislature, as pointed out by the statute, is that there shall be such a description of the picture as to enable a person who has it before him to judge whether or not the registration applied to the one he is about to copy. If we take that to be the object of the legislature, it will be sufficient to describe the picture by some conventional name, and the particulars of the subject need not be given in detail. It would in all cases be a question of fact whether the description is sufficient to point out the picture registered. If we consider it as a question of fact, there can be no reasonable doubt that the description of each of the pictures is sufficient. The picture "Ordered on Foreign Service" represents an officer, who is ordered abroad, taking leave of a lady, and no one can doubt that is the picture intended. So again, "My First Sermon" describes with sufficient exactness a child impressed with the novelty of her situation sitting in a pew, and listening with her eyes open; while the same child, fast asleep in a pew, forms the subject of "My Second Sermon." Who can doubt that in each of these cases the description is sufficient? There may be a few instances in which the mere registration of the name of the picture is not sufficient; for instance, Sir E. Landseer's picture of a Newfoundland dog might possibly be insufficiently registered under the description of "A Distinguished Member of the Humane Society." Similarly the well-known picture called "A Piper and a Pair of Nutcrackers," representing a bullfinch and a pair of squirrels, might not be accurately pointed out by its name. In either of these cases the names would scarcely be sufficient, and it would be advisable for a person proposing to register them to add a sketch or outline of the work. But when the subject is indicated, as it is here, it seems to be merely a question of fact whether the description affords enough information, and I cannot doubt that it does.

The next question is this: The copyright in the picture belongs to Mr. Graves; he made an engraving of it, of which he sold

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copies; he had not given any right to others to multiply them, and the photographs for which the penalties were recovered were made by photographing the engraving, and not the original picture, and it has been argued that the photograph of the engraving, being the reproduction of a copy of the design of the painting, is not a copy of the painting itself. It seems to me that cannot be so. When the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies; if in the result that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps. It must be borne in mind that Mr. Graves is the owner of the copyrights in the painting and the engraving; had they been in different persons, another question might have arisen which it is unnecessary to consider. I think that the copy from an intervening copy is a copy from the painting and within the prohibition of the statute. A doubt was suggested by the Court whether there might not be a difficulty arising upon the wording of s. 6, and it was thrown out that, reddendo singula singulis, the enactment might merely mean the imitation of a painting by a painting, of a drawing by a drawing, and of a photograph by a photograph, and that a photograph of a drawing would not be within the meaning of the legislature. But when we look at the first section, which is the key to the whole act, it gives to the author of every original painting, drawing, or photograph, the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph and the negative thereof, by any means and of any size; and the terms used are so extensive that it is plain that a photograph of a painting, of a drawing, or of another photograph, made without the consent of the owner, though of a different size, provided it be a reproduction of the design, is such an infringement as would subject the maker to the penalty.

The only other question is, whether the offender is liable to a penalty for every copy sold, or only on each contract to sell. In point of fact twenty-six copies were sold, but they were sold in two parcels, thirteen copies in each; and it has been contended that there were but two offences. In the case of *Brooke* v. *Milliken* (1)

(1) 3 T. R. 509.

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the penalty was imposed by 12 Geo. 2, c. 36, for importing for sale any book first published in this kingdom and reprinted in any other place, and it enacted that the offender should forfeit 5*l.* and double the value of every book sold. In that case there could be no doubt that the meaning of the statute was, the penalty should be cumulative, viz. double the value of each book. In the present case the words are, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding 10*l.* It is quite clear that this imposes a penalty for every copy sold; a different construction would result in an absurdity, and defeat the intention of the legislature. The penalty is imposed also for importation, and it would be monstrous that if a man had consigned from abroad a cargo of imitations, the utmost penalty that could be imposed on him would be the sum of 10*l.* It would be well worth his while to run the risk of paying that small sum, and to import and to distribute for sale elsewhere a quantity worth many thousands of pounds. The legislature were dealing with an offence which was likely to be committed wholesale, and they have used words meaning that the sale of every copy shall be an offence, and if ten copies be sold at one time, ten offences are committed, and the offender may be punished for each separately.

I am, therefore, of opinion that the rule should be refused on all the points.

MELLOR and LUSH, JJ., concurred.

Rule refused.

Attorneys for applicant: *Redpath & Holdsworth.*

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April 28.

WATKIN *v.* HALL.

Slander—Plea of Justification—Innuendo—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *s.* 61.

Declaration, that the defendant had spoken of the plaintiff, who was chairman of the South-Eastern Railway Company, and concerning a fall in the shares of the company, the words following: "You have heard what has caused the fall—I mean, the rumour about the South-Eastern chairman having failed?" meaning thereby that the defendant, being chairman of the South-Eastern Railway Company, had become embarrassed in his pecuniary affairs, and had become and was insolvent. Plea, that the defendant meant, and was understood by the bystanders to mean, that there had been and there was a rumour current on the Stock Exchange about the chairman of the South-Eastern Railway Company having failed, and not that the plaintiff had become embarrassed, and had become insolvent, as in the innuendo alleged; and that it was true that there had been and then was a rumour current on the Stock Exchange that the chairman of the South-Eastern Railway Company had failed:—

Held, that the plea was no answer to the declaration, for that the existence of the rumour did not justify the repetition of the slander contained in it, without shewing that the defendant believed it to be true, and that he spoke the words on a justifiable occasion.

Held, also, that if the latter part of the plea were rejected, the plea could not be supported as amounting to the general issue, for that by the Common Law Procedure Act, 1852, s. 61, the plaintiff would succeed, if the words uttered by the defendant turned out actionable, although not used in the sense put upon them by the innuendo.

Declaration, that the plaintiff was the chairman and a director of a railway company established by act of parliament, to wit, the South-Eastern Railway Company, for reward and salary to the plaintiff in that behalf; and was also the chairman and a director of a certain other railway company established by act of parliament, to wit, The Manchester, Sheffield, and Lincolnshire Railway Company, also for reward and salary for him in that behalf; and then was also the chairman and a director of the Grand Trunk of Canada Railway, also for reward and salary to him in that behalf; and was a holder and proprietor of a large quantity of shares of great value, and was otherwise interested in the several companies and the concerns and affairs thereof respectively, and in the welfare and prosperity thereof respectively, and devoted and gave much of his time and attention to the management and business of the several companies respectively and greatly occupied himself

therewith, and thereby acquired great gains. And that shortly before the committing of the grievances a fall in the market value of the shares in the South-Eastern Railway Company had occurred and taken place, and the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him as such chairman and director of the South-Eastern Railway Company, and of and concerning him in his connection with the company and of his position therein, and of and concerning the fall in the market value of and concerning the shares in the South-Eastern Railway Company, and of and concerning a rumour assumed by the defendant to have existed and been circulated respecting the plaintiff and respecting his pecuniary position and solvency, and of and concerning the premises, the words following, that is to say, "you have heard what has caused the fall," (meaning thereby the fall in the market value of the shares in the South-Eastern Railway Company), "I" (meaning the defendant) "mean the rumour about the South-Eastern chairman having failed," (meaning thereby that the plaintiff so being such chairman of the South-Eastern Railway Company and such director of the company had become embarrassed in his pecuniary affairs and had become and was insolvent), alleging special damage.

Plea, that in speaking the words in the declaration mentioned, the defendant meant, and was understood by the bystanders to mean, that there had been and there was a rumour current on the Stock Exchange about the chairman of the South-Eastern Railway Company having failed; and not that the plaintiff had become embarrassed, and had become and was insolvent as in the innuendo in the declaration alleged. And the defendant further says that it was and is true that there had been and then was a rumour current in the Stock Exchange about the chairman of the South-Eastern Railway Company having failed.

Demurrer and joinder.

Beasley, in support of the demurrer. The plea is pleaded by way of justification, but does not justify the slander: it puts another construction on the words, and repeats the slander. [He was then stopped by the Court.]

Holl, contrà. The plea is a good plea, as it expressly negatives

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that the words were understood to mean that the plaintiff was in embarrassed circumstances.

[BLACKBURN, J. Suppose the innuendo were struck out, would it not be slanderous to repeat the rumour?]

The reason why the repetition of a slander is actionable is because the words are equally injurious, whether the defendant originates or merely repeats them; but, in this case, the plea expressly negatives the fact that the words were spoken in a slanderous sense.

[BLACKBURN, J. The plea alleges that the words were used in a sense different to that put upon them in the declaration, and it must be averred that that other sense is not actionable, otherwise the repetition is equally injurious to the plaintiff.]

The plea can also be supported as amounting to the general issue. If the latter portion of it were struck out, it would be good as a traverse of the innuendo. In the notes to *Lake* v. *King* (1), it is said that where defamatory words are spoken, not in the malicious sense imputed to them, but in an innocent sense, or upon any occasion which warranted the publication, this matter may be given in evidence under the general issue, because it proves that the defendant is not guilty of the slander alleged against him.

[LUSH, J. But the words here are alleged in the plea to have been spoken, neither in an innocent sense, nor upon an occasion which warrants the publication of them. It was held in *M'Pherson* v. *Daniels* (2), that in an action for slander, it was no justification that the defendant did not originate, but merely repeated, the words complained of, unless he believed them to be true, and spoke the words on a justifiable occasion.]

Notwithstanding s. 61 of the Common Law Procedure Act, 1852, the plaintiff cannot maintain his action, if he fail to prove the innuendo; and, therefore, it is necessary to shew by the plea the real sense in which the words were used, and that the innuendo is untrue. In *Brembridge* v. *Latimer* (3), Willes, J., says, "Formerly when the declaration made use of an insufficient innuendo, that innuendo might always be treated as surplusage to prevent the

(1) 1 Wm. Saund. 130, n. 1. (2) 10 B. & C. 263.
(3) 12 W. R. 878, 879.

plaintiff from being defeated, but where the innuendo could be supported the plaintiff was bound by it. Now the words of s. 61, which provide "that where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient," make no difference in the old laws of pleading and evidence; the plaintiff must always sustain the cause of action of which he has complained, and not abandon it." The plaintiff must therefore stand, either on the declaration as it is, or declare on the ordinary meaning of the words, if actionable, without any innuendo, for otherwise the defendant could not safely plead a justification of the slander in the sense imputed to it by the plaintiff by the innuendo, without also justifying the slander in any other sense which the words might possibly bear.

BLACKBURN, J. The only questions are, whether or not an action will lie for stating —upon an occasion which does not shew the communication to be privileged—that there is a rumour upon the Stock Exchange that the plaintiff, who is a trader, was in insolvent circumstances, and had failed; the defendant stating, not that the plaintiff was insolvent, but that there was a rumour to that effect; and whether it would be a justification to shew the rumour did exist, and that the defendant had only repeated it, and stated at the time openly that it was only a rumour. Where disparaging words are spoken of a person, and either actual injury has flowed from them, or they were spoken of him in the way of his trade or profession, in contemplation of law damage has accrued to the person defamed. According to the doctrine which formerly prevailed, one reason why an action would lie for words imputing an indictable offence, was that damage might accrue from the possibility of their utterance influencing the grand jury, who might thereby be induced to find a bill. In modern times such a reason would not be allowed. Again, to assert of any man that he then had an infectious disease, or to say of a cattle-dealer that he then had the cattle disease amongst his cows, would be actionable; because in the former instance no one would associate with a person so affected, in the latter, no one would buy cows of the cattle-dealer. The result of these instances is, that where the matter charges crime, or misconduct in a person's trade,

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or actually produces loss, the law implies malice, and the person uttering the slander must pay damages, on the ground that he has uttered it wantonly; provided the plaintiff can shew that there was nothing to disprove the malice implied by law from the mere fact of stating without reason that which is injurious; but if the slanderer's statement be uttered on an occasion which justifies it, unless malice in fact be proved, the legal inference that it exists is rebutted, although the slanderer's statement may have been made without cause. There is no pretence on the record, as it stands now—whatever the evidence may turn out to be—that the slander was uttered under circumstances which justify the repetition of the rumour, upon the ground of the repetition being a privileged communication. Then, does the allegation that the slander was a rumour, which the defendant in fact heard, afford a defence? I do not think better words can be used to express the principle applicable to this point than those of Littledale, J. He says (1), "It is competent to a defendant, upon the general issue, to shew that the words were not spoken maliciously, by proving that they were spoken on an occasion or under circumstances which the law, on grounds of public policy allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead that matter specially, because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter, though true, and thereby subject himself to an indictment), but because it shews that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. Now, a defendant by shewing that he stated, at the time when he published slanderous matter of a plaintiff, that he heard it from a third person, does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not shew that the slander was published on an occasion, or under circumstances which the law on grounds of public policy allows. Nor does it shew that the plaintiff

(1) 10 B. & C. at pp. 272, 273.

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has not sustained, or is not entitled in a court of law to recover damages. As great an injury may accrue from the wrongful repetition as from the first publication of slander; the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shews, not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant, and may consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person, as well as the defendant." I adopt those words of Littledale, J., in *M'Pherson* v. *Daniels* (1); I adopt those words, expressing, as I think they do, in accurate language, the idea in my mind upon the subject. The question is, whether the words repeated by the defendant were likely to be injurious to the plaintiff, and calculated to do him damage, being uttered by the defendant without any reason that would make it not malicious to repeat them. Whether the fact that other people had spread the report does, or does not, entitle the plaintiff to recover substantial damages, or whether one farthing would be sufficient, is a question for the jury to estimate on weighing the actual mischief that the plaintiff may have suffered from the unauthorized repetition of a rumour, which must, in its nature, be mischievous to a person in trade, namely, a rumour that he has failed.

Mr. Holl endeavoured to urge, because the plaintiff has put in an innuendo, stating that it was intended to impute that the plaintiff had actually become insolvent, the allegation in the plea that the defendant did not use the words in that sense is so far equivalent to the general issue; and, then, that the latter part of the plea, which relates to the rumour, may be rejected as surplusage, and that the plea will then sufficiently answer the declaration. Before the passing of the Common Law Procedure Act, 1852, an innuendo was preceded by an inducement as to the application of the slander, and if the inducement did not support the innuendo, the action

(1) 10 B. & C. at pp. 272, 273.

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failed, because it was not allowed to be shewn that the words were used in a different, though slanderous sense, unless the declaration charged words which were actionable without any explanation. The legislature, however, has altered the law, and by s. 61 of the Common Law Procedure Act, 1852, which enacts that, "in actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to shew how such words or matter were used in that sense," every innuendo may be good, although not supported by a prefatory averment. And then the section proceeds: "and such averment shall be put in issue by the denial of the alleged libel or slander; and, where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient." Those latter words I can put no other meaning on, than that the legislature enacted, that a declaration containing one count for libel or slander, with an innuendo that the words were used in a particular meaning, shall be taken as if there were two counts, one with the innuendo and one without the innuendo; and if the plaintiff prove either, it is sufficient. It follows, then, that the defendant may plead a justification as to the words with the meaning in the innuendo, and also as to them without the meaning. I think the decision in *Brembridge* v. *Latimer* (1) correct, because in that case a portion of a newspaper article being set forth in the declaration, with an innuendo, the defendant endeavoured to shew that if the whole article was taken, the plaintiff would have had a different cause of action, and he sought, by his plea, to set out the whole article, and, so, to justify it as true in fact. That was a matter utterly irrelevant to the question at issue, whether he had published the libel charged in the declaration. The Court of Common Pleas refused to allow the plea. The observation of Willes, J., on that occasion, was perfectly right, when taken with reference to the matter before the court, but it does not apply to this case.

LUSH, J. I am of the same opinion. The defendant in this case admits that he made use of these words, speaking of a person

(1) 12 W. R. 878.

in a commercial position, and, therefore, liable to be injured. "You have heard what has caused the fall—I mean, the rumour about the South-Eastern Chairman having failed." He admits that he used those words; but he says, in effect, he is not to be responsible, because he did not first utter the words. Then, is a person at liberty to circulate rumours that may be injurious to the commercial character of another, although it is proved that he did not invent them? It is no justification to a person, in giving currency to that which is injurious to the character of another, for him to say, that he heard the statement made by another person. If he justifies at all, he must shew that he made the communication under circumstances that gave it a privileged character, that he was justified in making that privileged communication, or that the words themselves, when he spoke the words, were true. It is not enough to say that he heard it from some other person. As to the second ground urged for the defendant, the plaintiff says, by the innuendo, that those words meant that the plaintiff was insolvent; and Mr. Holl says, that the plaintiff is bound by the meaning which he has put upon them, that the defendant negatives that, and that so the plea is a good one. To hold that, as it seems to me, would be entirely to neutralize s. 61 of the Common Law Procedure Act, the object of that being to give to a declaration like this a kind of double character, and to give the plaintiff the benefit of an action, if the words themselves are actionable, whether the precise meaning which he ascribes to them by the innuendo is proved or not. It is not enough to say, that the plaintiff has failed in placing upon them the meaning he intended by the innuendo, if the words which the defendant did use are capable of another meaning which renders them actionable.

Judgment for the plaintiff.

Attorneys for plaintiff: *Uptons, Johnson, & Upton.*
Attorneys for defendant: *Lewis, Munns, Nunn, & Longden.*

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LORD *v.* LEE.

Arbitration—Enlargement of Time by Judge after Award made—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 15.

By the Common Law Procedure Act, 1854, s. 15, the arbitrator, under any document or compulsory order of reference, shall make his award, unless the document, &c., contains a different limit of time, within three months after he shall have been appointed and shall have entered upon the reference; and it shall be lawful for the Court of which the document is or may be made a rule, or for any judge thereof, from time to time to enlarge the term for making the award.

An arbitrator, under a submission by agreement in writing which contained no limit of time, made his award more than three months after he had entered upon the reference, and a judge afterwards enlarged the time to a subsequent day; and the award was taken up before that day, and an action brought upon it:—

Held, that the judge had power to enlarge the time after the award had been made, and that the effect of the enlargement was the same as if it had been made by consent of the parties, viz., to ratify what had been previously done by the arbitrator without authority; and that the award was therefore valid.

Declaration for money payable from the defendant to the plaintiff under an award.

Plea, never indebted. Issue thereon.

At the trial before Mellor, J., at the sittings in Middlesex after Trinity Term, 1867, it appeared that there being matters in difference between the plaintiff and defendant, an agreement of reference was made and signed on the 8th of August, 1866. No time for making the award was mentioned in the submission. The arbitrator entered upon the reference at once. On the 17th of January, 1867, he made his award, and gave notice the same day that he had made it. On the 7th of February the submission was made a rule of court; and on the 11th of March a judge's order was obtained, ordering "that the time for the arbitrator to make his award be enlarged till the 15th of March instant." The award was taken up on the 14th of March, and was in favour of the plaintiff.

A verdict was directed for the plaintiff for the amount awarded, with leave to move to enter it for the defendant.

A rule was obtained accordingly, on the ground that the time for making the award had not been duly nor legally enlarged by the arbitrator, and the Court or judge had no power to enlarge the time after the award had been made.

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Denman, Q.C., and *Willoughby*, shewed cause. No doubt, as no time for making the award was inserted in the submission, the time by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 15, was three months from the time the arbitrator entered upon the reference. But that section (1) enacts that it shall be lawful for the Court or judge, for good cause to be stated in the rule or order, from time to time to enlarge the term for making the award, and that authorized the judge to enlarge the term for making the award after the term originally limited had elapsed. The current of decisions under this, and the similar enactment of 3 & 4 Wm. 4, c. 42, s. 39, is clearly to that effect. In *Browne* v. *Collyer* (2), Wightman, J., enlarged the time under the former act under precisely similar circumstances. *In re Burdon* (3) shews, if any authority were necessary, that the statute of William is not repealed; and the decision in *Ward* v. *The Secretary of State for War* (4) is to the same effect as *Browne* v. *Collyer* (2), and governs the present case. It may be doubted, however, whether a reference by consent is within s. 15 at all: *Watson* v. *Bennett* (5); and if it is not, then there was no limit to the time for making the award, and it is valid without the order.

[BLACKBURN, J. Sections 11—14 apply in terms to deeds, instruments, or documents, by which parties refer by consent: "Such document" in s. 15 clearly refers to these.]

Mason v. *Wallis* (6) may be cited by the other side, but that was a decision before 3 & 4 Wm. 4, c. 42; and the power to enlarge the time depended on the terms of the agreement of the parties which had not been complied with.

(1) 17 & 18 Vict. c. 125, s. 15: "The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time), within three months after he shall have been appointed and shall have entered upon the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may by consent in writing enlarge the time for making the award; and it shall be lawful for the superior court of which such submission, document, or order is or may be made a rule of court, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award."

(2) 20 L. J. (Q.B.) 426.

(3) 27 L. J. (C.P.) 250.

(4) 32 L. J. (Q.B.) 53.

(5) 5 H. & N. 831; 29 L. J. (Ex.) 357.

(6) 10 B. & C. 107.

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M. Chambers, Q.C., Joyce, and *W. B. Cooper*, in support of the rule. The Court has no power to enlarge the time after the award has been made, so as to make that good which was in its inception a nullity. The intention of the section was simply that the parties should not be able to withdraw, although the arbitrator might have delayed or been unable to close the reference and make the award within the three months. The words are "to enlarge the time for making the award;" if the award is already made, how can the time for making it be enlarged? The order was to enable the arbitrator to do something, but he has done nothing. He has simply delivered as his award a document which was made when he was for the time functus officio: *Mason* v. *Wallis* (1) shews that an award made by an arbitrator when his powers were suspended is not rendered valid by a subsequent enlargement. In *Reid* v. *Fryatt* (2) the award was made after the order ratifying the enlargement of the time, and the enlargement by the arbitrator was before the original time had elapsed: that case also shews what "from time to time" means; it does not extend the powers indefinitely. Either there was no power at all to enlarge the time under the circumstances, or, if there was, the effect is at most that of a new submission, enabling the arbitrator to take up the reference at the point at which it was when his authority ceased. In either view the present award is a nullity. *Browne* v. *Collyer* (3) was not a decision that the judge could enlarge the time after the award had been made. Wightman, J., simply made the order for what it was worth, so as not to exclude the party in whose favour the award was from bringing an action.

[BLACKBURN, J. No doubt that is so: and the same may be said of what the Court did in *Ward* v. *The Secretary at War* (4); but the reasoning both of Wightman, J. and the full Court goes directly to shew the judge had the power. If I make an instrument professing to act as the agent for another, having no authority, it is a nullity, but if he afterwards ratifies my act the instrument becomes good from the time it is made.]

This is not the case of a ratification.

[LUSH, J. If not, the argument must go the length, that if

(1) 10 B. & C. 107.
(2) 1 M. & S. 1.
(3) 20 L. J. (Q. B.) 426.
(4) 32 L. J. (Q. B.) 53.

meetings had been held without the knowledge of the want of enlargement, after the time has been enlarged the witnesses examined at those meetings must be re-examined.]

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That goes to shew that the judge cannot enlarge the time after it has once lapsed.

[LUSH, J. If the written consent of parties could validate past meetings held without knowledge of the time having elapsed, the order of the judge must surely have the same effect.

Denman, Q.C., referred to *Tyerman* v. *Smith*. (1)]

BLACKBURN, J. After the discussion we have had, I do not think any further consideration is necessary to arrive at the correct construction of s. 15. I feel no doubt that, under the clause in the section, which says that "it shall be lawful for the Court or a judge, for good cause, from time to time, to enlarge the time for making the award," the judge may at any time give such further time to the arbitrator to make his award as he shall think fit under the circumstances, so as to make it as if the further time had been originally given in the submission. Thus, if the time originally limited was twelve months, and the judge give six months more, it is the same as if the time had been from the first eighteen months, and the effect is to make any step taken by the arbitrator within the eighteen months valid. It will elucidate the matter to consider what an arbitration was at common law, and what the position of an arbitrator and the parties was. An arbitration was when parties agreed to give authority to one person to act for them and to decide the matter in question between them, and when, by the authority thus conferred upon him, that person had given his decision the matter was settled and an action would lie to enforce his decision; but inasmuch as it was only an authority which was conferred upon him, the death or revocation of the will of either of the parties revoked the authority; and even if the parties had bound themselves by a covenant not to revoke the authority, the authority might still be revoked, though an action would lie for the breach of covenant. Now it is also a principle of the common law that whenever an act is done by a person professing to act for another, though in reality he had no authority at

(1) 6 E. & B. 719; 25 L. J. (Q.B.) 359.

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the time (subject to exceptions which do not affect the present case), the ratification of that other had the same effect as if the authority had been originally conferred, so as even to affect the vested rights of third persons. The case of a distress made without authority, but subsequently ratified, is a familiar instance of this principle. So if an arbitrator omits to enlarge the time limited for making his award, but continues to act as if he had enlarged it, even to making his award, although in fact he has no authority, yet he is a person animo agendi, and if the parties afterwards choose to ratify his act by agreeing that the time shall be enlarged or otherwise, though the act was not enforceable, yet, if ratified, it would be just as binding as if done with original authority. It was argued for the defendant that such an enlargement of the time amounted only to the making of a fresh submission; but that is not so; the act having been done under the professed authority of the previous submission, the enlargement of the time is a ratification in the shape of a continuation of the original authority.

Such would have been the position of the parties before the statutes relating to arbitration were passed. First came the statute of 9 & 10 Wm. 3, c. 15, which enacted that wherever there was existing differences, the parties might make it a clause in their submission, that it should be made a rule of court, and the award be then enforced by the process of the court. Next was the 3 & 4 Wm. 4, c. 42, by which the parties no longer had power to revoke the authority of the arbitrator except by leave of the court or a judge; that put an end to one of the evils attendant on references; and by the same section (s. 39), the Court or a judge had power given from time to time to enlarge the term for the arbitrator making his award; and there are similar words in s. 15 of the Common Law Procedure Act, 1854. Some doubt was at first entertained whether the latter clause of s. 39 applied to any cases except those in which there had been an attempt by one of the parties to revoke; and also as to whether the enlargement by the judge must not be made during the time within which the arbitrator might himself have enlarged it. The words admitted of either interpretation: but it was ultimately decided that the power of the judge was general, and applied where there had been no attempt

to revoke, and also after the original time for making the award had elapsed, and the arbitrator had neglected to enlarge it; and no doubt this was the proper construction to put upon the enactment, as the power of enlargement would very seldom be wanted, except in the case of an oversight by the arbitrator. The Common Law Procedure Act, s. 15, after limiting the time to three months when the submission is silent as to the limit of time, gives the parties themselves power to enlarge the term; and the effect of this enlargement of the term under the statute would be the same as at common law, that is, it makes it as if the extended time had been originally inserted in the submission. The same construction must be given to the clause giving power to the Court or judge to enlarge the time; and if an enlargement by consent of parties amounts to a ratification of all that has been done in the interval, inasmuch as it amounts to saying that the submission shall be read as if the extended time had been originally inserted, then the award, which had been made in the interval after the three months had expired, and before the order for enlargement was made, as it purported to be made under the authority of the parties, would be valid if the authority were subsequently ratified by the parties by enlargement. The same power is given to the judge, in his discretion, from time to time to enlarge the term, notwithstanding the parties do not consent, and it must have the same effect as an enlargement by consent, namely, amount to a ratification. The evils of an opposite construction are obvious. Suppose the arbitrator inadvertently to have neglected to enlarge the time, and several meetings to have been held in the interval before the omission is discovered; if the subsequent enlargement of the time had only the effect of a new submission, all the witnesses must be recalled, and all the expense must be incurred over again. It happens in the present case that the award was made before the oversight was discovered and the order obtained. Surely it is a very salutary enactment which enables a judge to cure a defect which he thinks a mere defect of form, and which the parties might have cured themselves. I am, therefore, clearly of opinion that the section gives power to the judge to enlarge the term for making the award at any time, and under any circumstances in which he thinks there is good cause for his intervention, (of course

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he would not grant an order if he saw that injustice might be done thereby), and the effect of the enlargement is the same as if it had been by the parties; it amounts to a ratification, and is as if the enlarged time had been originally in the submission.

The cases cited in favour of an opposite construction are easily disposed of. In *Mason* v. *Wallis* (1) the arbitrator had enlarged the period for making the award, but there had been no judge's order confirming such enlargement, as was required by the terms of the submission, and consequently the award was clearly a nullity. In *Reid* v. *Fryatt* (2) the judge's order ratifying the enlargement was granted before the award had been made, and the award was held good; but the case is no authority for saying that if the award had been made first, it would not have been ratified. It is true that the case of *Browne* v. *Collyer* (3), before Wightman, J., in the Bail Court, and *Ward* v. *The Secretary of War* (4), in the full Court, neither of them go so far as the present case. In the one Wightman, J., enlarged the time, leaving the decision to be questioned by an action; in the other I had enlarged the time, and the Court, of which I was a member, only refused to interfere in a summary manner, without deciding the question. But in both cases the reasons which induced the Court to act as it did, particularly what the Chief Justice said in *Ward* v. *The Secretary of War* (4), is very strong to show that the policy and good sense of the matter is to construe the section as we now do. They are authorities, therefore, as far as they go; none have been cited to the contrary; and I think, therefore, for the reasons I have given, that the plaintiff is entitled to succeed, and that the rule must be discharged.

MELLOR, J. I am of the same opinion. When we come to consider the causes which have so often made references abortive, we find the course of legislation has been to prevent an arbitration, to which the parties have assented, failing through the mere mistake or inadvertence of the arbitrator. I agree with my Brother Blackburn's reasons, and do not intend to go through the cases; but I may say that the very form of expression used in s. 15 shews that the object was to put the parties and the arbitrator in the same

(1) 10 B. & C. 107.
(2) 1 M. & S. 1.
(3) 20 L. J. (Q.B.) 426.
(4) 32 L. J. (Q.B.) 53.

position as if the original submission had contained the enlarged time, so that the arbitrator should during the whole time be clothed with the same authority as that originally given to him though for a shorter period. The contrary construction would fritter away the whole use of the enactment.

LUSH, J. I am also of the same opinion. This is the first time that the particular point has come before the courts to be conclusively decided, but we are considerably assisted by the decisions under the 3 & 4 Wm. 4, c. 42, which have been uniformly in the direction which we are now pursuing. No limit of time is given within which the judge may enlarge the time, and he is not limited to the time within which the arbitrator himself could enlarge it, even although it be said in the submission that the arbitrator shall make his award on or before a certain day. If that is so, it cannot be any obstacle to the judge's power that the arbitrator in the interval has done something which is at the time a nullity. The only question is, what is the effect of the order when made? Has it, as Mr. Cooper argued, merely the effect of a new submission, so that the arbitrator must start afresh; or does it add all the intermediate time to the time originally limited, so as to put all parties in the same position as if the submission contained the enlarged time as well as that originally limited? Surely the effect cannot be merely to make valid what was valid before; the effect must be to validate all that has been done. Look at the consequences of the limited construction. Suppose a number of sittings to have taken place before it is discovered that the time limited has expired, and that an order for enlargement is then obtained; if the defendant's argument be correct, and the order only authorized the arbitrator to resume his functions, all the expense incurred in the interval must be incurred again with no possible advantage to either party. That never could have been meant. The true meaning of the statute is, that when the order is once made, it annexes to the time originally limited all the intervening time and such further time as the order expresses. Mr. Cooper says the section will not admit of this construction, and that if the award is already made, the time for making it cannot be enlarged. The words are, "it shall be lawful for the Court or judge, for good

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cause to be stated in the rule or order, from time to time, to enlarge the time for making the award;" that does not necessarily imply that anything further is to be done after the order is made, the form of expression implies rather the contrary. I am confirmed in this view by the consideration that the parties themselves might ratify what the arbitrator had already done without authority; and the object of the enactment was that where the parties themselves would not agree to ratify, the judge might, where justice requires it (he would not, of course, exercise his power if he saw it would work injustice or wrong), do in invitos what the parties themselves might and ought to have done.

Rule discharged.

Attorneys for plaintiffs: *Willoughby & Cox.*
Attorney for defendant: *W. Bristow.*

May 11.

[IN THE EXCHEQUER CHAMBER.]

HUDSON *v.* EDE.

Ship and Shipping—Charterparty, construction of, with reference to Port of Loading—"Detention by Ice not to be reckoned as Laying Days."

A charterparty provided that the ship should proceed to Sulina, or outside, in sufficient depth of water to load the ship, and there load from the agents of the merchants a complete cargo of grain. The cargo to be brought and taken from alongside the ship at the ports of loading and discharge at charterer's expense and risk. Thirty running days to be allowed (if the ship be not sooner despatched) for loading and unloading, and ten days in demurrage over and above the laying days, at 6*l.* a day; *detention by ice and quarantine not to be reckoned as laying days.*

There are no storehouses at the port of Sulina itself; but the grain shipped at Sulina is kept at places higher up the Danube, and is brought by steam lighters down the river and unloaded direct into ships waiting their lading at Sulina. The ship being ready to load, notice was given to the charterer; but after six days, before any cargo had been supplied, the river immediately above Sulina became frozen up, and so remained for two months, the port of Sulina itself remaining open. The ship having been thus delayed waiting for cargo:—

Held, that this was a "detention by ice," within the meaning of the charterparty; that though the circumstances of the port were unknown to the shipowner, yet being well known in the grain trade, they must be taken to have been the

basis of the contract; and that whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship, the exception in the charterparty would apply.

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ERROR on a judgment of the Court of Queen's Bench in favour of the defendant on a special case. (1)

The action was brought to recover demurrage and damages for the detention of the ship under a charterparty of the ship *Fria*. The material parts of the charterparty were "that the vessel should proceed to Sulina, or outside in sufficient depth of water to load the ship or so near thereto as she may safely get, and there load from the agents of the merchant a complete cargo of grain or seed at shipper's option. Sufficient grain or seed to ballast the vessel to be supplied, if required, before final discharge of outward cargo; time so occupied not to count as lay days. The cargo to be brought to and taken from alongside the ship at the ports of loading and discharge at the charterer's expense and risk. Thirty running days to be allowed the merchants (if the ship be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the lay days at 6*l.* a day. Detention by ice and quarantine not to be reckoned as laying days."

The Court of Queen's Bench gave judgment for the defendant on the ground, that, as from the circumstances of the port of Sulina the cargo had to be brought down the river after the arrival of the ship, the words "detention by ice" in the charterparty must be construed to extend to detention by ice of the lighters coming down the river to load the ship; and that the shipowner could not recover demurrage or damages for the time during which the river above Sulina was frozen over.

The pleadings and facts are set out at length in the report below. (1)

Feb. 4. *Archibald* for the defendant.

Sir G. Honyman, Q.C. (*Watkin Williams* with him), for the plaintiff.

The arguments were the same as in the court below.

Cur. adv. vult.

(1) Law Rep. 2 Q. B. 566.

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May 11. The judgment of the Court (Kelly, C.B., Willes, Keating, and Montague Smith, JJ., and Bramwell and Channell, BB.) was delivered by

KELLY, C.B. This was an action upon a charterparty, in which the question arose whether the detention of the ship in the port of Sulina, occasioned under the circumstances hereafter stated, was a detention by ice within the meaning of the following words in the charterparty: "Detention by ice and quarantine not to be reckoned as laying days."

The vessel in question proceeded to the port of Sulina to take in a cargo of grain. Six of the lay days out of thirty elapsed without any of the cargo having been put on board the vessel. On the seventh, and for a long time afterwards, although the port itself and the sea immediately outside were free from ice, the river Danube from Sulina upwards as far as Galatz, a distance of 110 miles, from which port the grain was to be brought to be put on board the vessel, was frozen over, or so encumbered with ice as to be impassable for the lighters by which the grain was to be conveyed. It appears upon the case as stated that Galatz is the nearest to Sulina of the storing places on the Danube from which grain is brought for shipment there, and that there exists at Sulina no storehouses or other places for keeping or storing grain, and that grain is never kept at Sulina to await the arrival of a vessel, except sometimes by the Greek and Oriental Steam Navigation Company for their own steamers.

Under these circumstances, we are of opinion that this was a detention by ice within the meaning of the charterparty. The conveyance by the river between Galatz and the ship at Sulina may be considered as a part of the act of loading, and as there were no storehouses for grain at Sulina, the case seems to be the same as if the ice lay between the shore, from which, of necessity, the grain must be brought, and the vessel in which it was to be loaded, and so that the parties must have contemplated that portion of the river as a part of the waters through which the cargo was to be conveyed between the shore and the ship, and in which detention by ice was to be provided against and excepted in the charterparty.

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It was well known to persons in the grain trade, that grain to be shipped at Sulina is brought down the river from Galatz, or other places, in lighters, and that such lighters, on their arrival at Sulina, are discharged directly into the ship intended to export the grain; and that when there is ice in the Danube between Galatz and Sulina, the navigation in the river by these lighters is often rendered impossible; and this therefore, although, as it happened, unknown to the plaintiff or his broker, having been well known to persons engaged in the grain trade between ports in the Lower Danube and Sulina, must be taken to have been the basis of the contract, and supports the construction of this exception in the charterparty contended for by the defendant.

My Brother Willes has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship, the exception in the charterparty would apply.

On the whole, therefore, it appears to us that the judgment was right, and should be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Clarke, Son, & Rawlins.*
Attorneys for defendant: *Cotterill & Sons.*

LAYARD, APPELLANT; OVEY, RESPONDENT.

May 2.

Turnpike—Exemption from Toll of Clergyman visiting a sick Parishioner, under 3 Geo. 4, c. 126, s. 32.

Post 418

A clergyman bonâ fide going to visit a sick parishioner is not, by reason of his having other persons in the carriage with him, disentitled to the exemption from turnpike toll given by 3 Geo. 4, c. 126, s. 32.

CASE stated by Justices of Middlesex under 20 & 21 Vict. c. 43.

The respondent made complaint against the appellant for forcibly passing through a turnpike gate without paying the toll for a horse and carriage.

The appellant is the perpetual curate of St. John's, Wembly. On the 22nd of October, 1867, he was sent for to visit a sick

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parishioner within his parish; he went to visit her in a pony-carriage drawn by one pony; he took with him in his carriage his wife and two daughters; he could have gone the whole way through his own parish, but the distance was shortened by nearly a mile by going into the turnpike road, which was in another parish, and on which road was the Sheepcote toll-gate; he went by the turnpike road, and, on passing the toll-gate, the respondent demanded the toll, which the appellant refused to pay, alleging that he was exempt as being the perpetual curate of the ecclesiastical district of St. John's, Wembly, then going to visit a sick parishioner within his own district or parish.

Upon these facts, it was contended by the appellant that he was entitled to the exemption claimed by reason of the proviso in 3 Geo. 4, c. 126, s. 32, that "no toll shall be demanded or taken by virtue of that or any other act or acts of parliament on any turnpike road . . . from any rector, vicar, or curate going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish."

It was contended by the respondent that, although the appellant was personally exempt from toll, that exemption did not extend to other persons conveyed with him in the carriage.

To this it was replied by the appellant that, inasmuch as the person being the driver and owner of a carriage is the person liable to pay the toll, if it could not be levied upon the clergyman driving, it could not be levied upon the other occupants of the carriage, and therefore could not be demanded at all; that the meaning of the language of the statute 3 Geo. 4 was precise and fixed, and was not variable by the mere presence in the appellant's carriage of other persons.

It was the opinion of the justices that, inasmuch as persons on military duty could not take others with them, even although the statute had exempted the carriage conveying them, still less was it competent to a clergyman to do so for whom the statute had made the exemption merely a personal one. It was also their opinion that though the clergyman driving the carriage is personally exempt, he does not thereby also avoid the liability he may incur as being the driver by reason of other persons who are not exempt being in the carriage with him, the liability of the driver

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of the carriage being a liability to pay the charge incurred by the carriage and its contents.

For these reasons they convicted the appellant in a penalty of 1s. and costs.

If the Court should be of opinion that the appellant was rightly convicted, then the conviction was to remain; but if the Court should be of opinion that the appellant was not liable to pay the toll demanded of him, then the conviction was to be quashed.

F. T. Streeten, for the respondent, urged the reasons given by the justices in support of the conviction.

Prideaux, Q.C. (*Macnamara* with him), for the appellant, was not heard.

The Court (COCKBURN, C.J., and BLACKBURN, J.) were clearly of opinion that, if a clergyman was bonâ fide going to visit a sick parishioner, which was a question of fact for the justices, the fact of his having other persons in the carriage with him did not deprive him of the exemption from toll.

Conviction quashed. (1)

Attorney for appellant: *Greatorex.*

Attorneys for respondent: *Robinson and Preston.*

(1) See the next case.

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May 9.

BRUNSKILL, Appellant; WATSON, Respondent.

Turnpike—Exemption from Toll of Clergyman going on Parochial Duty—3 Geo. 4, c. 126, s. 32.

Ante 417

A clergyman of the Church of England, a curate of parish A., while officiating temporarily in a neighbouring parish B., without the permission or licence of the bishop, during the absence of the rector of the latter parish, is not, when riding to perform clerical duty in parish B., entitled to exemption from turnpike toll under 3 Geo. 4, c. 126, s. 32, which exempts from toll "any curate going to or returning from visiting any sick parishioner or on other his parochial duty within his parish."

Case stated by Justices of Westmoreland under 20 & 21 Vict. c. 43.

An information was preferred by the appellant against the respondent, under 4 Geo. 4, c. 95, s. 30, that she did, being the collector of tolls at a certain turnpike gate, on the 6th of July, 1867, unlawfully demand and take from the appellant the sum of 2*d*., as the toll of a horse on which the appellant was then riding, the appellant being exempt from the payment of such toll by reason of his being de facto curate of the parish of Clifton, and going on his parochial duty within the parish of Clifton, and claiming such exemption, contrary to the statute, &c.

At the hearing it was proved that the appellant was a clergyman of the church of England, and curate of the parish of Askham, which adjoins the parish of Lowther, and was resident at Hackthorpe, in the parish of Lowther, distant about two and a half miles from the rectory of the parish of Clifton, but was not a beneficed clergyman having care of souls. Shortly prior to the 6th of July, the rector of the parish of Clifton, through ill health, was obliged to leave his parish and go to the sea-side, and he engaged the appellant to discharge the clerical duties of the parish of Clifton during his absence.

The appellant admitted that the arrangement between him and the rector of Clifton was not communicated to the bishop of the diocese; that he was not licensed as the curate of the parish of Clifton, de facto or otherwise, by the bishop of the diocese during

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the rector's absence; and that he had no written or verbal permission or authority from the bishop, authorizing him to perform the duties of curate or other clerical duties, of or for the parish of Clifton during the rector's absence.

On the 6th of July the appellant was riding on the turnpike road from Hackthorpe, in the parish of Lowther, where he resides, into the parish of Clifton, for the purpose of performing a marriage ceremony in the parish church of Clifton, which was to take place on that day. On arriving at the Clifton turnpike gate, situate within the parish of Clifton, at which the respondent was collector, toll to the amount of 2*d.* was demanded by the respondent; the appellant claimed exemption on the ground that he was the acting clergyman of the parish of Clifton, and that he was then going on the parochial duties of the parish, viz., to perform the marriage service. But the respondent insisted on the toll, which the appellant paid.

It was contended by the appellant, on the authority of *Temple* v. *Dickenson* (1), that he was de facto curate of the parish of Clifton, and at the time of demand made he was actually going to the Clifton parish church for the purpose of discharging clerical duty therein, and was therefore entitled to the exemption claimed.

It was contended for the respondent that the appellant was not legally entitled to exemption from the toll under 3 Geo. 4, c. 126, s. 32 (2), on the ground that he was not curate of the parish of Clifton within the meaning of the exemption, he having no permission or sanction whatever from the bishop of the diocese to perform the duties of curate of that parish.

The justices were of opinion that the appellant was merely the officiating minister for the time being of the parish of Clifton, at the request of the rector of Clifton, during his absence, and not de facto or otherwise curate of the parish of Clifton, and dismissed the information.

The question for the opinion of the Court was, whether the justices were right in point of law.

(1) 14 E. & E. 34; 28 L. J. (M.C.) 10.

(2) 3 Geo. 4, c. 126, s. 32, enacts that "no toll shall be demanded or taken" . . . (inter alia) "from any rector, vicar, or curate going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish."

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Crompton Hutton, for the appellant, urged the point stated in the case, and relied upon the authority of *Temple* v. *Dickenson*. (1)

H. James, for the respondent, was not called upon.

LUSH, J. I think our judgment ought to be for the respondent. The exemption is given to "any rector, vicar, or curate, going to or returning from visiting any sick parishioner, or on other his parochial duty within *his* parish." The question is, is the appellant going on his parochial duty within his parish? He is the curate of the neighbouring parish going to render assistance to a clergyman temporarily absent from the adjoining parish. He clearly is not within the exemption. If a clergyman invites another to come and do duty for him, he would not be entitled to exemption of toll within the meaning of this statute. The case of *Temple* v. *Dickenson* (1), is very different. There the vicarage had become vacant, and the churchwarden had appointed a curate to take the duty of the parish during the vacancy; the curate there was responsible for the duties of the parish, though he had not been formally licensed by the bishop. It is quite consistent with that case, that a clergyman going to render temporary assistance to a neighbouring clergyman is not within the exemption of the statute.

HANNEN, J., concurred.

Appeal dismissed. (2)

Attorneys for appellant: *Gray, Johnston, & Mounsey.*
Attorneys for respondent: *Westall & Roberts.*

(1) 1 E. & E. 34; 28 L. J. (M.C.) 10. (2) See the preceding case.

GREENSLADE *v.* DARBY.

1868
May 1.

Church and Churchyard—Right to Herbage in Churchyard—Perpetual Curate—Lay Rector.

An impropriate rectory, after its surrender to the Crown on the dissolution of monasteries, was granted by Queen Elizabeth to lay impropriators. Up to 1826 the impropriators appointed a curate with a yearly stipend of 31*l.* 10*s.*; in that year the curacy was augmented out of Queen Anne's Bounty, and the then lay impropriator charged the rectory, glebe land, tithes, &c., with the yearly rent-charge of 31*l.* 10*s.*, payable to the curate for the time being; the curacy then became a perpetual benefice by force of the 1 Geo. 1, st. 2, c. 10. The plaintiff was duly nominated, licensed, and instituted to the benefice in 1852. From the time of the grant of Elizabeth the lay impropriators had had exclusive possession of all the tithes and glebe lands; and during living memory these lands had been let to tenants together with the right of depasturing the churchyard with sheep, and the tenants had exercised this right without interruption till 1866, when the plaintiff gave the defendant, the present tenant, notice not to trespass, and then brought an action. On a case stating the above facts, the Court having power to draw inferences of fact:—

Held, that the action was not maintainable; for that though the plaintiff had possession of the churchyard for spiritual purposes, it was not such a possession as excluded the lay impropriator (or his tenants) in whom the soil and herbage was still vested.

CASE stated after writ without pleadings.

The plaintiff is the perpetual curate and incumbent of Stoke-sub-Hamden, in the county of Somerset. The church stands in an enclosed churchyard, into which the public have access by a gate leading from the high road.

The defendant is the tenant and occupier of certain glebe land adjoining the churchyard, and communicating with the same by another gate, and the action is brought against the defendant for having turned his sheep into the churchyard, and depastured the grass there, against the will of the plaintiff.

1. The rectory of Stoke-sub-Hamden, Somerset, is an impropriate rectory, and after its surrender to the Crown upon the dissolution of monasteries, was granted by Queen Elizabeth to two persons, namely, John Robinson and Lawrence Singleton, as joint tenants in fee, from whom the family in whom the rectory is at present vested derive their title. The rectory is valued in the King's books at 49*l.* 19*s.* 8½*d.*, and its endowment is there stated to arise from glebe and tithes.

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2. Sarah Frances Hawkesworth, wife of Thomas Hawkesworth, is the present lay rector and impropriator of the church. The tithes of the parish are commuted at 447*l.* 10*s.* There is a considerable extent of glebe land, with a house upon it. The house and glebe land are in the occupation of the defendant.

3. Prior to the year 1826, the owner for the time being of the impropriate rectory provided a curate to serve the church at Stoke at an annual stipend of 31*l.* 10*s.*, which, down to the last-mentioned year, was not a charge on the rectory or tithes.

4. On the 17th of February, 1826, Andrew Bain, the father of Sarah Frances Hawkesworth, as the then patron of the church, signed a consent to the augmentation of the living by the governors of Queen Anne's Bounty, who, accordingly, in that year augmented the living with 1600*l.* out of the Parliamentary Grants Fund, now represented by 1846*l.* 13*s.* 6*d.* consols, and in consideration of such augmentation Andrew Bain, by deed dated the 4th of July, 1826, and made between him of the first part, the governors of Queen Anne's Bounty of the second part, and the Rev. Richard Philips, therein described as curate of the curacy of Stoke-under-Hamden, aforesaid, of the third part, charged the impropriate rectory of Stoke-under-Hamden aforesaid, and the glebe lands, tithes, tenths, fruits, profits, oblations, obventions, emoluments, commodities, advantages, and appurtenances whatsoever thereunto belonging or appertaining, with the yearly rent-charge of 31*l.* 10*s.*, payable quarterly to Richard Philips and his successors, curates of the curacy of Stoke-under-Hamden. (1) On the augmentation the curacy became a perpetual benefice under the statute 1 Geo. 1, st. 2, c. 10.

5. In 1842 a further augmentation was made out of the Royal Bounty Fund of 200*l.*, to meet benefactions amounting to 350*l.*, total 550*l.*

6. The tithes, both great and small, are enjoyed by Thomas Hawkesworth, in right of his wife, and the rent-charge of 31*l.* 10*s.* is paid to the plaintiff by equal quarterly payments.

7. The plaintiff was nominated by Mr. and Mrs. Hawkesworth to the incumbency in 1852, in the usual form:—"These are to

(1) A copy of the deed was annexed to the case, but it contained nothing further material to the present case.

certify that we have nominated, and by these presents do nominate, William Greenslade, clerk, to the said perpetual and augmented curacy, and to have and enjoy all the rights, benefits, advantages, and appurtenances thereunto belonging."

8. Thereupon the plaintiff was duly licensed by the bishop of the diocese.

9. The plaintiff was duly instituted, and read himself in, and has since continued to be incumbent, and to perform the duties of the church.

10. The plaintiff and his predecessors have always received for his and their own use and benefit, without payment to any other person, the fees for brick graves and head stones from time to time opened or put up in the churchyard.

11. From the time of the grant mentioned in the first paragraph, the lay impropriators of the church have had the exclusive possession of all the tithes of the parish, and the glebe. The glebe lands have from time to time during living memory been let out to tenants by the lay impropriators, who have also upon such occasions let to such tenants the depasturing of the churchyard with sheep, and the tenants under such demises have turned their sheep into the churchyard to graze from time to time during every year until the commencement of this action, without interruption, except as hereinafter mentioned. The defendant became tenant of the glebe lands under such a letting about eighteen years ago. In the wall which divides the glebe lands from the churchyard on one side there is a gateway by which the tenant has access to the churchyard. There is a gate in the gateway which was put up and is always repaired by the lay impropriator, and the public have no right to use the gate or gateway, which leads only to the glebe fields. The public have (as before stated) access to the churchyard and church by a different gateway leading from the high road.

12. In the year 1865 the plaintiff objected to the defendant turning his sheep into the churchyard, and he claimed the legal right of possession of the churchyard as perpetual curate, and a correspondence took place between the plaintiff and Mr. Hawkesworth on the subject.

On the 23rd of January, 1866, the plaintiff gave the defendant

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notice not to turn his sheep into the churchyard, or he would be subject to an action of trespass.

13. The defendant continued to turn his sheep into the churchyard after the receipt of this notice, whereupon the present action was brought.

The Court were to be at liberty to draw the same inferences of fact that a jury might draw. The question for the opinion of the Court was whether the present action is maintainable.

Manisty, Q.C. (*W. Williams* with him). The question is, whether a perpetual curate has such possession in the churchyard attached to his church that he can maintain an action of trespass against the defendant, who is the lay impropriator, for turning his sheep into it. Since the 1 Geo. 1, st. 2, c. 10, the perpetual curate and the vicar stand in the same position. By that statute the perpetual curacy is made a benefice, and it is laid down in Cripps on the Law relating to the Church and Clergy, 4th ed. p. 158: "A perpetual curate has an interest for life in his curacy in the same manner and as fully as a rector or vicar—that is to say, he can only be deprived by the ordinary, and that in proper course of law." And when the plaintiff was nominated and instituted he was put in possession of the church and churchyard, and all the incidents belonging to the curacy. In Cripps, 4th ed. p. 486, it is further laid down: "The freehold of the churchyard is, to a qualified extent, in the minister; and this, it is said, whether he be rector or vicar. . . . The soil and profits belong to him, and he might make a lease thereof; which profits appear to be the feed and trees growing in the churchyard, or in fact, any crop which it may bear, but even as to these the right of the minister is considerably qualified, and with respect to the trees in a churchyard, the right of the minister over them was long since limited by a statute or declaratory treatise supposed to have been made in the reign of Edward I., but the certain date of which is unknown." The trees probably were planted with a view of protecting the church and of repairing the chancel, and though the right to them is in the minister, yet he may not cut them down except for the purpose of repairing the chancel.

[BLACKBURN, J. In Burn's Ecclesiastical Law, vol. i. p. 347, tit.

Church, it is said, "if in the same church there be both rector and vicar, it may be doubted (says Lyndwood) (1), to whether of them the trees or grass shall belong. But I suppose (says he) they shall belong to the rector; unless in the endowment of the vicarage they shall be otherwise assigned."]

According to Cripps, 4th ed. p. 488, "although the feed growing in the churchyard belongs of right to the minister, yet it is presumed that he can only take or use it in such a manner as may be no nuisance to the parishioners, and that if he were to turn horses or cattle there to graze, by which the graves might be trampled or defaced, or the tombstones or trees be injured, the ordinary might properly interfere to order their removal." The freehold of the church and churchyard is in the rector, but when the curate is put in possession, it is as if the rector had given him the church and churchyard, induction is the means by which the incumbent obtains full possession of his benefice; endowment has nothing to do with his getting possession of the church and churchyard. When once the incumbent is in possession of the church and the churchyard which is annexed to it, a layman has no right to deal with them, for they then are things ecclesiastical. *Griffin* v. *Deighton* (2) is a direct authority that the plaintiff can maintain this action against the defendant. *Mason* v. *Lambert* (3) shews that the possession of a perpetual curate is analogous to that of a vicar. Assuming that the plaintiff has possession of the churchyard, the defendant has no right to turn his sheep into it. The fact that he has done so since living memory does not give him the right. If the freehold is in the defendant, there can be no prescriptive claim under Lord Tenterden's Act, as he cannot acquiesce in a right in his own freehold.

Pinder for the defendant. It would appear from *Strachy* v. *Francis* (4), that the property in trees in a churchyard is in the lay impropriator. Lord Hardwicke there says: "A rector may

(1) The passage in Lyndwood's Provinciale, lib. iii. tit. 28, p. 267, is: "Si in eâdem ecclesiâ sit dare rectorem et vicarium, ad quem ipsorum tales arbores aut herbæ pertinebunt, posset dubitari. Sed dic quod pertinebunt ad rectorem, nisi in portione vicario assignatâ de eis fiat mentio in specie aut in genere, ut sc. ad ipsum vicarium pertineant, nam tunc pertinebunt ad vicarium."

(2) 5 B. & S. 93; 33 L. J. (Q.B.) 29; in Ex. Ch. 181.

(3) 12 Q. B. 795.

(4) 2 Atk. 217.

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cut down timber for the repairs of the parsonage house or the chancel, but not for any common purpose; and this he may justify in doing under 35 Edw. 1, st. 2, intituled Statutum ne rector prosternat arbores in cœmeterio. If it is the custom of the country, he may cut down underwood for any purpose, but if he grubs it up it is waste."

[BLACKBURN, J. I doubt whether Lord Hardwicke is speaking of trees in a churchyard.]

Cripps, 4th ed. p. 487, states the case thus: "The patron of a living prayed an injunction against the rector to stay waste in cutting down timber in a churchyard, . . . and the injunction was granted." The origin of perpetual curates is well understood. The 4 Hen. 4, c. 12, enacts, "that in every church appropriated there shall be a secular person ordained vicar perpetual, canonically instituted and inducted, and covenably endowed by the discretion of the ordinary. But if the benefice was given ad mensam monachorum, and so not appropriated in the common form, but granted by way of union pleno jure; in that case it was served by a temporary curate belonging to their own house, and sent out as occasion required. The like liberty of not appointing a perpetual vicar was sometimes granted by dispensation in benefices not annexed to their tables, in consideration of the poverty of the house, or the nearness of the church. But when such appropriations, together with the charge of providing for the cure, were transferred (after the dissolution of the religious houses) from spiritual societies to single lay persons, who were not capable of serving them by themselves, and who, by consequence, were obliged to nominate some particular person to the ordinary for his licence to serve the cure; the curate by this mean became so far perpetual as not to be wholly at the pleasure of the appropriator, nor removeable but by the due revocation of the licence of the ordinary." This is the history of perpetual curacies, as given in Burn's Ecclesiastical Law, vol. ii., p. 55, tit. Curates; and Gibson's Codex, 2nd edit., vol. ii., p. 819, is cited. There is a great distinction between a vicarage and a perpetual curacy. A vicarage cannot exist without an endowment, and the vicar is irremoveable by 4 Hen. 4, c. 12; but an endowment is not necessary to constitute a perpetual curacy, and the perpetual curate can be removed with the leave of the bishop. Up to 1826, the perpetual

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curate in this present case had a stipend of 31*l.* 10*s.* a year, paid by the lay impropriator, and which was not charged on any lands; but in that year, the living being augmented by Queen Anne's Bounty, the lay impropriator charged his lands with the payment of that sum. This in no way altered the plaintiff's position as perpetual curate. The question as to what estate a perpetual curate took was discussed, but not decided, in *Doe* d. *Richardson* v. *Thomas*. (1) Coleridge, J., says: "Whether the perpetual curate here has a fee simple is a very difficult and disputable point; but it is not necessary for me to decide that. For whether he have a fee simple or not, he has it not in right of his church. I do not think that 1 Geo. 1, st. 2, c. 10, alters the estate or interest of a perpetual curate; it merely turns the land into a benefice, and makes the endowment indefeasible. But it does not extend the parochial domain; if the land was not held in right of the church before, it is not so now." That opinion is correct. The perpetual curate takes nothing in right of the church, but only under a deed of endowment. The deed of 1826 merely makes an income which was payable at the will of the patron irrevocable and fixed, by charging it on his land. In *Jones* v. *Ellis* (2) it was held that the perpetual curate of an augmented parochial chapelry has a sufficient possession to enable him to maintain trespass against a wrongdoer, but the Court abstained from deciding in whom the freehold was. *Griffin* v. *Deighton* (3) is also reconcileable with the present case. The freehold of a parish church is in the lay rector, but the possession is in the spiritual incumbent, so that he could maintain trespass.

Manisty, Q.C., in reply.

COCKBURN, C.J. I think our judgment should be for the defendant. I am of opinion that 1 Geo. 1, st. 2, c. 10, has no bearing on the present case. That statute merely enacts that where the Commissioners of Queen Anne's Bounty augment a perpetual curacy, the curate is constituted a body corporate, and is enabled to take the benefit of any endowment which may be made by the commissioners or any other person who chooses to endow the

(1) 9 A. & E. 556, 575.
(2) 2 Y. & J. 265.
(3) 5 B. & S. 93; 33 L. J. (Q.B.) 29; in Ex. Ch. 181.

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living. The endowment in this case, made under the provisions of the statute, was twofold. It consisted partly of a sum of money granted by the commissioners, and partly of an annuity or rent charge which the lay impropriator, by agreement with the commissioners, undertook to create for the benefit of the curate, and which by the deed which is set out in the case he did establish in all time to come as a charge for the benefit of the perpetual curate. The curacy was not endowed with the glebe, nor with the churchyard. But it is said, nevertheless, being perpetual curate, the plaintiff is entitled to the possession of the church and churchyard, and being entitled to the possession of the churchyard, he has a right to keep all persons out of it, except the churchwardens, who have a right to go there for the purpose of discharging the duties incidental to their office. But that seems to me to assume the matter in dispute—namely, that the possession which the incumbent has of the churchyard is such as to exclude the rights which otherwise would be incidental to the freehold, which the lay rector is admitted to have. I quite agree with the former decisions, that an incumbent has the possession of the churchyard, as well as of the church, for spiritual purposes; therefore, for burials, and for all purposes attached to his office, he has undoubtedly uncontrolled possession of the churchyard. But I do not think that the possession of the churchyard for these purposes excludes a lay rector from a right to the profits arising out of the soil. It is clear that there are cases in which a lay rector may have the right to the trees growing in the churchyard. A vicar, certainly, does not stand in a worse position than a perpetual curate; but it is laid down by Lyndwood (1), that in point of law the vicar is not entitled to the trees, unless they have been granted in the endowment of the vicarage. So an endowment may carry with it the rights which are ordinarily enjoyed by a freeholder. A vicar may be, and in almost every case is, entitled to the herbage. But if the trees may be in the lay rector, so may also the grass. Now, we know that since 4 Hen. 4, c. 12, an endowment is necessary to create a vicarage, but that is not the case with regard to a perpetual curacy. That may exist without an endowment, therefore all the rights incidental to the soil may be in the lay rector. There

(1) Lyndwood's Provinciale, lib. iii. tit. 28, p. 267; ante, p. 425 (1.)

are cases in which the right to the trees does not go to the vicar, because they formed, as Lyndwood says, no portion of the endowment of the vicarage. So the possession by the perpetual curate does not carry with it anything except that which is incidental to his office. The possession carries nothing beyond that, unless there be an endowment. The case shews that the exclusive right to the pasture is not part of the endowment, and mere possession will not confer it on the incumbent. I think, therefore, that what has been the custom as far back as living memory can go is right, and that which has existed for so long a time, and has received the sanction of long usage, is the true indication of the rights of the parties.

BLACKBURN, J. I am of the same opinion. Originally the land was the property of some lay person, which, when the rectory was formed, was dedicated to the church and conveyed by him to the rector. Thus the freehold was vested in the rector and he was entitled to the land, including the grass, herbage, and everything else, as fully as the original owner had been; but as the land had been set apart by consecration for the church and churchyard, the right which the rector as the owner of the freehold had in the profits was proportionately diminished, because he could not desecrate it, or use it for any purpose which was inconsistent with the object of its consecration. Nevertheless, the enjoyment of the property, so far as it could be exercised by one holding a sacred office, belonged to the rector as owner of the freehold. Now, it was necessary for the preservation of the churchyard to remove trees in it which had been blown down, and also to cut, mow, and graze the herbage growing there; in each case there would be some profit to be made; but, notwithstanding the church was consecrated, the profit would belong to the rector as being owner of the freehold. Afterwards, in many cases, an ecclesiastical house became possessed of a rectory and also of these profits as incidental thereto, and the members of the house appointed some one of their own body to perform the religious services, and he had no particular interest in the profits because he was a mere nominee of the monastery. Vicarages were thus established, and then 4 Hen. 4, c. 12, came into operation, which compelled the monastery to appoint as vicar a secular person, not a member of

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any religious house, and not removeable at the caprice of the monastery; and the statute further enacted that he should be sufficiently endowed; the vicar thus appointed, being the person to perform the religious duties, had naturally possession of the consecrated ground on which the church and churchyard stood for the purpose of performing the ecclesiastical duties. After the passing of the statute, the general practice was for the monastery to give the person they appointed vicar the small tithes, and sometimes a portion of the glebe land. The vicar having such possession as I have described, it was only natural that he should take, as a consequence of his endowment, the profits, if any, which arose from the pasturage in the churchyard. I should say, that in almost every case the pasturage of the churchyard passed by the endowment, and if it be found in fact that vicars have for many centuries been enjoying that right, the reasonable presumption is, that originally it was part of their endowment. I do not think that an endowment necessarily passed the right to the vicar, and if it be proved that the lay rector ever since the time the vicarage was instituted has enjoyed the pasturage in the churchyard and treated it as his own, I should draw the inference that the endowment did not include that right which remained in the lay rector. I should say it certainly remained in him if the vicar did not enjoy it. And if it was in the lay rector that will not be inconsistent with the vicar having possession of the church and churchyard, so far as is necessary for the purpose of performing the sacred duties of his office.

But the case of a perpetual curate is different. Sometimes the rectory belonged to a monastery under such circumstances as to exempt it from the operation of the 4 Hen. 4, c. 12, and the obligation to appoint a vicar; it appointed a curate who had no endowment and no possession further than necessarily flowed from the fact that the curate had to perform certain duties, and consequently must have possession to a certain extent for that purpose. No doubt he had possession in one sense, because it was necessary that he should enter the church and churchyard for the purpose of discharging his sacred duties, and to that extent the perpetual curate had possession before the Reformation. After the Reformation, when the living came into the hands of the lay im-

propriator, he was compelled to appoint a curate whom the ordinary could not change capriciously. The curate became, to a certain extent, perpetual. That did not give the perpetual curate a more absolute possession of the churchyard than the former curate had. He must likewise have such a possession as is necessary for the performance of his sacred duties, but there is no reason in law why the perpetual curate should now have such a possession as to enable him to take the profits arising from the use of the churchyard for secular purposes. Indeed, in almost all cases, and as a matter of fact in this particular case, the lay rector does appear to have enjoyed those profits. The perpetual curate, no doubt, is in possession of the churchyard for ecclesiastical purposes, that is to say for the purpose of burial and the like. Does then the fact that he has received an augmentation from Queen Anne's Bounty alter his position? I think not. The legislature might have enacted in express terms that when any endowment was given to the perpetual curate from Queen Anne's Bounty, the freehold in the soil of the churchyard should be taken from the lay rector and vested in the perpetual curate; but the statute 1 Geo. 1, st. 2, c. 10, contains no such enactment. It merely enacts that when the Commissioners of Queen Anne's Bounty confer an endowment on the perpetual curate he becomes a body corporate, and ipso facto has a fixed pecuniary interest in his curacy, and enjoys an income no longer precarious and dependent on the will of the rector; a provision is inserted that the lay rector should not receive any benefit of the augmentation from Queen Anne's Bounty, but there is nothing taking away any right of property existing in the lay rector and giving it to the perpetual curate. It was contended for the plaintiff, if I understood the argument, that inasmuch as the induction of a vicar must of necessity, by operation of law, put him in full possession of the churchyard, including the right to the herbage, the perpetual curate when put into possession must have the same right to the pasture. The perpetual curate is necessarily put in possession for the purpose of his sacred office, but there is no authority for saying that he has such a possession as to entitle him to turn sheep into the churchyard, or to mow the grass growing there for his own use. As I have already said, in the case of vicarages the presumption from

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general usage and practice is, that the right to the pasture of the churchyard was part of the vicar's endowment, but perpetual curates do not stand in a similar position.

HANNEN, J. I am of the same opinion. For the reasons that have been given, I think that the statute 1 Geo. 1, st. 2, c. 10, does not affect this case. The Court are at liberty to draw inferences of fact, and it is found that the lay impropriator, as far as living memory goes back, has been in the enjoyment of the right which he now asserts. It lies therefore upon the plaintiff to shew that this right so enjoyed could not have a legal origin. It has, undoubtedly, been asserted with great earnestness, that the state of things shewn in the case could not legally exist. No authority has been cited in support of that proposition, but it has been assumed that it necessarily follows from establishing that the perpetual curate has a right to the possession of the churchyard. If it is to be taken that the word "possession" means exclusive possession, or the right to exclude all other persons, of course there is an end of the question; but I can see no more reason why the possession of the perpetual curate for a purpose which may be necessary for the exercise of his ministration should exclude the right of the lay impropriator, than the possession of the perpetual curate would exclude persons claiming rights of way across the churchyard. It lies, as I have said, on the plaintiff to establish that the state of things shewn to exist could not have a legal origin. It appears to me that it may have had a legal origin in the manner suggested by Lyndwood (1), in the case of rectors and vicars. For these reasons, I think that our judgment should be for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Few & Co.*
Attorneys for defendant: *Surr & Gribble.*

(1) Lyndwood, at p. 267, cited in 1 Burn's Ecc. Law, 347; ante, p. 425 (1.)

CARR, APPELLANT; STRINGER, RESPONDENT.

1868
May 2.

Weights and Measures—5 & 6 *Wm.* 4, *c.* 63, *s.* 28—*Scales Unjust, if adjusted by Moveable Ball.*

The appellant was charged, before justices, with having a pair of unjust scales in his shop, under 5 & 6 Wm. 4, c. 63, s. 28, which inflicts a penalty on "any person who shall have in his possession a steelyard or other weighing machine which shall on examination be found incorrect or otherwise unjust." The scales were correct as to balance in the state in which they were found by the inspector; but there was hanging upon the weight end of the beam a hollow brass ball, which could be unscrewed at the neck and contained shot; the ball was hung by a hook upon the beam, and was easily removed by merely lifting it off. If the ball were removed, or any of the shot taken out, the scales were unjust and against the purchaser. The justices were of opinion that the ball was not part of the scales, as it was merely kept in its place by its own weight, and could be detached in an instant; and that as the shot could be removed from the ball and replaced at pleasure, it was not a proper instrument of adjustment; and they convicted the appellant:—

Held, that the justices were justified in drawing the above inferences of fact, and that the conviction was right.

CASE stated by Justices of Kent, under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant under s. 28 of 5 & 6 Wm. 4, c. 63 (1), charging that the respondent, inspector of weights and measures for a certain district, on &c., at &c., as such inspector being then and there duly

(1) By 5 & 6 Wm. 4, c. 63, s. 28, it is made lawful for any justice of the peace, or any inspector authorized in writing under the hand of a justice, "at all seasonable times to enter any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage, and there to examine all weights, measures, steelyards, and other weighing machines, and to compare and try the same with the copies of the imperial standard weights and measures required or authorized to be provided under this act; and if upon such examination it shall appear that the said weights or measures are light or otherwise unjust, the same shall be liable to be seized and forfeited; and the person or persons in whose possession the same shall be found, shall, on conviction, forfeit a sum not exceeding 5*l.*; and any person who shall have in his or her possession a steelyard or other weighing machine which shall on such examination be found incorrect or otherwise unjust, or who shall neglect or refuse to produce for such examination when thereto required, all weights, measures, steelyards, or other weighing machines which shall be in his or her possession, or shall otherwise obstruct or hinder such examination, shall be liable to a like penalty."

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authorized in writing under the hands of two justices, did enter a certain shop within his jurisdiction as such inspector, wherein goods were then exposed for sale, and that he did then and there examine all weights, measures, steelyards, and other weighing machines then and there being, and did then and there compare and try the same with the copies of the imperial standard weights and measures authorized to be provided under 5 & 6 Wm. 4, c. 63; and that the shop was then and there kept by the appellant; and that upon such examination it did then and there appear that three pairs of scales then and there found and then and there being in the possession of the said appellant, were unjust, contrary to the form of the statute.

At the hearing of the information it was proved and admitted by the appellant, that the respondent on the 27th of August, 1867, visited the shop of the appellant in Tunbridge, and there found three pairs of scales which were correct as to balance in the state they then were; but the respondent found hanging upon the weight end of the beam of each pair of scales a hollow brass ball. These brass balls are constructed with necks, which can be unscrewed so as to allow shot to be placed in the interior, and they were hung by stout brass wire hooks upon the beams of the scales, and were easily removeable therefrom by merely lifting them off. The respondent took one of these balls off a pair of scales, and having unscrewed the neck, he removed the shot with which it was partly filled, and then replaced the ball in its former position; and on testing the scale, found the latter to be then unjust and against the purchaser. It was admitted by the respondent that similar balls were very generally used by tradesmen for the purpose of adjustment.

It was contended by the respondent that this brass ball was not part of the scale, and was easily detached therefrom. That if the ball could be considered part of the scale, yet the shot with which it was loaded could not be so considered, as it could be removed at any time without apparent alteration in the scales, and consequently the scales themselves were unjust.

On behalf of the appellant, it was contended that the brass ball with its load of shot was a mere instrument of adjustment, attached to and forming part of the scales. That the scales were from time to time corrected by adding to or removing shot therefrom; and as

the scales in question were correct at the time they were used by the appellant and first examined by the respondent, and were only rendered incorrect by the respondent removing the ball or the shot, the respondent could not be convicted of any offence.

The justices were of opinion that the ball was not part of the scales, inasmuch as it merely hung thereon by its own weight, and could be detached in an instant. They were further of opinion, that as the shot could be removed from the ball and replaced at pleasure, it could not be considered a proper instrument of adjustment. They, therefore, found that the scales were unjust, and accordingly convicted the appellant of having in his possession unjust scales.

The questions of law, if any, arising on the above statement are: first, whether the justices were correct in their view of the case, that the ball being hung loosely on the beam of the scale did not form part of the scales; secondly, whether the shot in the ball, being entirely removeable, was or was not a proper instrument of adjustment, or could be considered as part of the scales.

Anderson, for the respondent. The appellant was rightly convicted under 5 & 6 Wm. 4, c. 63, s. 28, of having unjust scales in his shop. No doubt they balanced truly when the ball with the full complement of shot was hanging from the beam, but this ball and shot were no part of the scales, as the justices have found, and that fact distinguishes this case from *London and North Western Railway Company* v. *Richards*. (1)

The Court then called upon

Cohen, for the appellant. The ball and shot are merely a mode of adjustment, and as long as the machine, when adjusted, is not unjust, the person who uses it cannot be convicted of having an unjust weighing machine: *London and North Western Railway Company* v. *Richards*. (1)

[COCKBURN, C.J. In that case the weighing machine was liable to variation from atmospheric and other causes, and always required adjustment before using; here we have a pair of unjust scales only made just by the temporary addition of something which the justices have found is no part of the machine.]

(1) 2 B. & S. 326.

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The mere fact that the ball or shot can be removed is not sufficient to justify the justices in saying they are not part of the scales. Scales are liable to get out of balance by wear and tear, and this is a very common mode of adjustment, as the justices state in the case. *Great Western Railway Company* v. *Bailie* (1), in which it was held that the conviction was unjust, was a much stronger case than this; there the machine was 4 lbs. wrong, and required the addition of a 4 lb. weight to make it true; but here the scales in their normal state, with the ball hanging, were perfectly just.

[BLACKBURN, J. In that case Crompton, J., points out the distinction between it and *London and North Western Railway Company* v. *Richards* (2), viz., that the mode of adjustment in the latter case was an integral and necessary part of the machine; in the other it was something extraneous, which ought not to be necessary. Why should this ball and shot be necessary? At all events, if persons use this kind of adjustment they should take care that the scales without it should be against themselves, the sellers.]

There is no intention of committing fraud found here. The scale when examined was not unjust; and the constant possibility of a visit from an inspector at any moment is quite sufficient to prevent the commission of fraud by removing the ball or shot.

COCKBURN, C.J. I am very clearly of opinion that the conviction should be affirmed. Some little difficulty at first arose, as it rather seemed that the information was for having unjust weights, but on further looking into the case it appears that the information and conviction were for having unjust scales. Supposing from wear and tear, or any other cause, scales became so affected as to require adjustment, and you effect this by adding something not originally a part of the machine, so as to make it, as it were, permanently part of the machine, I am far from saying this addition might not be considered an integral part of the machine, and that the machine, when found on inspection to have been thus permanently adjusted, would not be just. But when you find that the weighing machine, be it scales or any other instrument of weigh-

(1) 5 B. & S. 928; 34 L. J. (M.C.) 31. (2) 2 B. & S. 326.

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ing, is in itself unjust, and that the error is only rectified by the introduction of some temporary contrivance that can be added or withdrawn at pleasure, the case is very different; and there is the more reason to hold the machine unjust that, in the present case, the contrivance can readily be made use of for the purpose of fraud, as by merely unhooking this ball or removing the shot the scales become unjust in favour of the seller and against the purchaser. It was urged that the possibility of the inspector coming at any moment would prevent the fraudulent misuse of this means of adjustment; but the inspector cannot always be at hand. It was for the very purpose of preventing, as it appears to me, the use of such contrivances as the present that the statute was passed. I think, therefore, the conviction was quite right, and that it must be affirmed.

BLACKBURN, J. I am entirely of the same opinion. Section 28 creates two different offences, the one that of having unjust weights, which, on conviction, are to be forfeited in addition to the penalty; the other of having unjust steelyards or other weighing machines, in which case a penalty only, without forfeiture, is to be inflicted. On first reading the information, it would appear to have been for having unjust weights, which would not have met the facts; but it is now clear that the information and conviction were for having unjust scales, and there can be no doubt that scales are a weighing machine. The question is, was there evidence to justify the finding of the justices? Were these scales "incorrect, or otherwise unjust?" Without the ball with the shot in it they would have been incorrect, and against the purchaser. Does the addition of the ball with the shot prevent the scales from being unjust? That depends upon whether the ball is an integral part of the machine; which is the test put by Crompton, J., in *London and North Western Railway Company* v. *Richards* (1), where he says:—"In the ordinary case of a false steelyard there is an intentional falsity, which may be corrected by putting an additional weight on the false arm: in this case an inaccuracy in the machine, which may have been occasioned by atmospheric influence, is to be corrected, and the great beauty of

(1) 2 B. & S. at p. 334.

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this machine is, that when an inaccuracy may, or rather must constantly occur, the machine has in itself an appliance by which that inaccuracy may be remedied. Unless that appliance, which is an integral part of the machine, is used, the instrument cannot be said to be properly tested." I do not wish to be understood, however, as saying if fraud might be facilitated by some appliance, though it were part of the machine itself, the machine might not be held as "otherwise unjust." Here no fraud is found or imputed; but I think, nevertheless, the scales were incorrect or unjust. The question is, were the justices justified in finding, on the facts, that the ball with the shot was not a part of the machine? They state that the balls are hung on the beams of the scales by stout wire hooks, and were easily removeable by merely lifting them off; and they were of opinion that the ball was not part of the scales, inasmuch as it merely hung thereon by its own weight, and could be detached in an instant; and that as the shot could be removed from the ball and replaced at pleasure, it could not be considered a proper instrument of adjustment. And they might well draw this inference, as no one can doubt that the removal of the ball or of part only of the shot might make a difference of half an ounce weight against the purchaser. Mr. Cohen contended that the fact that the balls or shot might be removed or detached does not shew that the balls were not part of the scales. I do not say that the bare fact of their being detachable is conclusive; but the fact of their being easily removeable was very good ground for coming to that conclusion. There was, therefore, in my opinion, ample evidence to justify the conviction. I would add, that if scales owing to wear and tear must require adjustment, and if it is necessary that the means of adjustment should be removeable, persons using such means should, in order to be secure against conviction, take care that the scales, when the moveable adjustment is removed, should turn against the vendor.

Conviction affirmed.

Attorney for appellants: *Thomas Kipping.*

Attorneys for respondent: *Stone, Wall, & Simpson, Tunbridge Wells.*

1868
May 8.

IN THE MATTER OF A PLAINT OF BEADNELL AND OTHERS, *v.* BEESON.

Salvage—County Court Judge—Jurisdiction in Salvage cases—Merchant Shipping Acts, 17 & 18 *Vict. c.* 104, *ss.* 458, 460; 25 & 26 *Vict. c.* 63, *s.* 49.

By 17 & 18 Vict. c. 104, s. 458, whenever a ship is in distress, and salvage services are rendered by any person, there shall be payable by the owners of the ship, &c., to such person "a reasonable amount of salvage;" and by s. 460, when any dispute arises between the owner and salvor as to the amount of salvage, and the sum claimed does not exceed 200*l.*, the dispute shall be referred to two justices. By 25 & 26 Vict. c. 63, s. 49, the jurisdiction is extended to cases where the value of the property saved does not exceed 1000*l.*, and the same jurisdiction is given to a county court judge. By County Court Rule 276, in proceedings under 25 & 26 Vict. c. 63, a plaint shall be entered, and a summons shall be issued thereon.

A plaint and summons were issued in a county court by the plaintiffs against the defendant, to answer the plaintiffs to a claim, the particulars of which were annexed; the particulars being, "the plaintiffs claim 250*l.*, amount agreed to be paid by the defendant to them for getting the defendants' schooner off the shore, and taking the schooner and cargo into a place of safety, the whole value of the schooner, cargo, &c., not exceeding 1000*l.*"

The defendant sought to prohibit the county court judge from proceeding with the plaint, on the ground that he had no jurisdiction, as it was not a salvage claim, but an action of debt for an agreed sum above 50*l.*, and also on the ground that the proceeding ought not to have been by plaint in the county court, the jurisdiction being given to the judge, and not to the court. It was not denied that the value of the property saved was under 1000*l.*, nor that there had been salvage services:—

Held, that the fact of there having been a sum agreed did not oust the jurisdiction of the county court judge, and that the proceedings were proper in form.

RULE calling on the defendant to shew cause why an order of Willes, J., should not be rescinded, and why the prohibition issued thereunder should not be set aside.

In March, 1868, a plaint was issued in the county court of Northumberland, holden at Berwick, the summons being:—

"In the county court of Northumberland, holden at Berwick.

"Between Beadnell and Others, plaintiffs; and
Beeson, defendant.

"You are hereby summoned to appear at a county court to be holden at Berwick on the 7th of April, 1868, to answer the plaintiffs to a claim for amount agreed to be paid to plaintiffs for getting defendant's schooner *Pride* off shore, and taking her into a place of safety, the particulars of which are hereunto annexed."

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The particulars were: "The plaintiffs claim 250*l.*, the amount agreed to be paid to them for getting the defendant's schooner *Pride* off the shore of the coast of Northumberland, at or near Holy Island, and taking the said schooner and her cargo into a place of safety, the whole value of the said schooner and her cargo, tackle, apparel, and furniture, not exceeding the sum of 1000*l.*"

On the 8th of April, an order was obtained from Willes, J., ex parte, that a prohibition should issue prohibiting the judge of the county court from proceeding with the hearing of the plaint, "on the ground that this cause is beyond the jurisdiction of the county court."

The value of the schooner *Pride* was sworn to be under 1000*l.*, viz., 375*l.*

It was not denied by the defendant that there had been salvage services.

A. L. Smith shewed cause. The county court judge had no jurisdiction. By s. 458 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) (1), whenever a ship is in distress, and services

(1) 17 & 18 Vict. c. 104, part viii. s. 458:—"In the following cases (that is to say): Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person: (1) In assisting such ship or boat: (2) In saving the lives of the persons belonging to such ship or boat: (3) In saving the cargo or apparel of such ship or boat, or any portion thereof. And whenever any wreck is saved by any person other than a receiver within the United Kingdom; there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services, or any of them, are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services, or the saving of such wreck, the amount of such salvage and expenses, which expenses are hereinafter included under the term salvage, to be determined in case of dispute in manner hereinafter mentioned."

Section 460:—"Disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined; but whenever any dispute arises elsewhere in the United Kingdom between the owners of any such ship, boat, cargo, apparel, or wreck as aforesaid, and the salvors, as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof by arbitration or otherwise, then, if the sum claimed does not exceed 200*l.*, such dispute shall be referred to the arbitration of any two justices of the peace resident as follows (that is to say): In case of wreck, resident at or near the place where such wreck is found: In case of services rendered to any ship

are rendered by any person, there shall be payable by the owners of such ship, &c., to the person by whom such services are rendered, a reasonable amount of salvage; and by s. 460, "whenever any dispute arises between the owners of the ship, &c., and the salvors, as to the amount of salvage, if the amount claimed does not exceed 200*l.*, such dispute shall be referred to two justices." By 25 & 26 Vict. c. 63, s. 49, the jurisdiction is extended to cases in which the value of the property saved does not exceed 1000*l.*; and the same jurisdiction is given to a county court judge. The jurisdiction, therefore, is limited to giving "a reasonable amount" for salvage services in cases of dispute as to the amout of salvage. The present action is for an agreed sum of 250*l.*, and is therefore an action of debt exceeding the amount over which the county court has jurisdiction; and not a salvage claim at all.

[BLACKBURN, J. It is not denied that there were salvage services.]

But where the amount has been agreed upon it is a matter of contract, not of salvage, as Lord Stowell held in *Mulgrave.* (1) That case and *Betsey* (2), and *True Blue* (3), shews that the agree-

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or boat, or to the persons, cargo, or apparel belonging thereto, resident at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident, by reason whereof the claim to salvage arises."

25 & 26 Vict. c. 63, s. 49:—"The provisions contained in the eighth partof the principal act (17 & 18 Vict. c. 104), for giving summary jurisdiction to two justices in salvage cases, and for preventing unnecessary appeals and litigation in such cases, shall be amended as follows (that is to say): (1) Such provision shall extend to all cases in which the value of the property saved does not exceed one thousand pounds, as well as to the cases provided for by the principal act: (2) Such provisions shall be held to apply whether the salvage service has been rendered within the limits of the United Kingdom or not: . . . (6) It shall be competent for any stipendiary magistrate, and also in England for any county court judge, in Scotland for the sheriff or sheriff substitute of any county, and in Ireland for the recorder of any borough in which there is a recorder, or for the chairman of quarter sessions in any county, to exercise the same jurisdiction in salvage cases as is given to two justices."

By County Court Rule (1867) 276:—"In proceedings in the county courts, under . . . 25 & 26 Vict. c. 63, a plaint shall be entered, and a summons shall be issued thereon, and the rules and practice of the court shall be adopted with respect to such proceedings, so far as the same are applicable."

(1) 2 Hagg. Ad. 77.

(2) 2 Wm. Rob. 167.

(3) 2 Wm. Rob. 176.

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ment is binding on the parties; and the matter cannot be re-opened. Secondly: If this is a claim of salvage, it cannot be recovered by plaint in the county court; the jurisdiction is given to the judge not to the court.

[BLACKBURN, J. My Brother Lush has referred us to County Court Rule 276, which expressly says that the proceeding shall be by plaint.]

It was ultra vires of the county court judges to make such a rule. By s. 464 of 17 & 18 Vict. c. 104, the appeal from the justices is to the Court of Admiralty, and the same right of appeal must be taken to be given from the county court judge. But if the proceedings be by plaint in the county court, the appeal will be to one of the superior courts; and the parties will also be entitled to have the case tried by a jury.

[BLACKBURN, J. The rule says that the rules and practice of the court shall be adopted only so far as they are applicable to such proceedings. The proceeding must be commenced in some way or other, why not by complaint and summons before the justices, by plaint and summons before the county court judge?]

This proceeding is in the county court, which has nothing to do with the matter; the jurisdiction is given to the judge not as judge of the court, but as persona designata, as the jurisdiction to tax costs on an inquiry as to compensation under the Lands Clauses Consolidation Act, s. 52: *Owen* v. *London and North Western Railway Company*. (1)

Crompton, in support of the rule. The judgment of Dr. Lushington in *The William and John* (2), is conclusive to shew that the fact of the agreement does not oust the jurisdiction of the justices or other inferior tribunal; but the claim remains a salvage claim notwithstanding; and that the agreement is not binding under all circumstances; but may be set aside if exorbitant, as the justices held in that case. So also in *Crus. V.* (3), the Court of Admiralty set aside an agreement as corrupt.

BLACKBURN, J. I think, after reading the judgment of Dr.

(1) Ante, p. 54.

(2) Brow. & Lush. 49; 32 L. J. (P. M. & A.) 102.

(3) Lush. 583.

Lushington in *The William and John* (1), we can come to no other conclusion than that the order for a prohibition ought not to have been made; and that the county court judge not only had jurisdiction, but jurisdiction to the exclusion of the Court of Admiralty. By s. 458, of 17 & 18 Vict. c. 104, "there shall be payable by the owners of such ship" (that is, a ship to which assistance has been rendered when in distress) "to the person by whom such services have been rendered, a reasonable amount of salvage." By s. 460, whenever a dispute arises between the owner and salvors as to the amount of salvage, if the sum claimed does not exceed 200*l.* the dispute is to be referred to two justices; by the subsequent statute, 25 & 26 Vict. c. 63, s. 49, the jurisdiction of justices is extended to cases in which the value of the property saved does not exceed 1000*l.* So that, as Dr. Lushington says (2): "The two statutes are to be read as one, and read thus. If the sum claimed does not exceed 200*l.*, or if the property saved does not exceed 1000*l.* such dispute shall be referred to justices." In the present case, the sum claimed exceeded 200*l.*, but the property saved was of less value than 1000*l.* By the same section (s. 49), the same jurisdiction is given to the county court judge. And one of the minor objections raised on behalf of the defendant is, that inasmuch as the jurisdiction is given to the county court judge with an appeal to the Court of Admiralty, the jurisdiction is given to the judge and not to the court; and so far the contention is right. But then it is argued, that therefore the proceedings ought not have been by plaint in the county court. But I do not think that this consequence at all follows; the matter must be brought before the judge and the proceedings commenced in some form or other, so as to summon or give notice to the other party, for the proceeding cannot be ex parte. A rule was therefore framed by the county court judges to meet the case (and I think it was quite competent to them to make the rule), that the proceeding in salvage matters should be by plaint; but when the matter is before the judge he will decide it, not as sitting with the usual jurisdiction of the county court, but with an appeal to the Court of Admi-

(1) Brow. & Lush. 49; 32 L. J. (P. M. & A.) 102.

(2) Brow. & Lush. at p. 55; 32 L. J. (P. M. & A.) at p. 103.

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ralty. I have, therefore, no doubt that the proceedings are quite sufficient in form; indeed, Mr. Smith failed to shew a better or more unobjectionable mode of proceeding.

The real and substantial question remains. The first statute said that there should be payable to the salvors "a reasonable amount of salvage;" that is no more than a repetition of what they were entitled to by the common law as administered in the Court of Admiralty; but there might be considerable doubt where there had been a bargain between the parties, and so the reasonable amount was no longer a matter at large and still to be determined, but had been turned into a fixed sum or debt above 50*l.*, whether this would not oust the jurisdiction of the county court judge. Now, Dr. Lushington, in the Court of Admiralty, held in a case (1) where the parties had agreed, and there had been a fair bargain, that the agreement was binding, and could not be disturbed by the court, as Lord Stowell had decided in a former case. (2) So that the salvors could not claim more nor the owners pay less. It might however be said, although the jurisdiction is only to give a "reasonable sum," still although the amount cannot be re-opened, why is the sum agreed less claimed as "salvage?" However, the case of *The William and John* (3) is conclusive of the present case. In that case there was an express bargain by an instrument signed by the master of the vessel, to give the plaintiffs 140*l.* for their services; and on their afterwards demanding that sum the defendants refused to pay, and brought the dispute before justices, but the plaintiffs refused to appear; the justices found that the value of the property saved was 208*l.*, and that the sum of 140*l.* named in the agreement was exorbitant, and they awarded 70*l.* as salvage. The plaintiffs then sued in the Court of Admiralty, and Dr. Lushington, on a review of the statutes, held that the justices had exclusive jurisdiction whenever the sum claimed did not exceed 200*l.*, or the value of the property recovered did not exceed 1000*l.*; and on the point as to there having been an agreement, he says: "There is one argument which I ought to notice, viz., that in cases of agreement the justices are not a competent tribunal. Such is not the case. The effect of an agreement is this only, that where the

(1) *The True Blue*, 2 Wm. Rob. 176.
(2) *The Mulgrave*, 2 Hagg. Ad. 77.
(3) Brow. & Lush. 49, 55; 32 L. J. (P. M. & A.) 102, 104.

suit has been rightly commenced in this Court (by reason of the claim being over 200*l.*, and the value of the property saved being over 1000*l.*), and the Court has awarded less than 200*l.*, the fact of the agreement may induce the Court to certify that the case was a proper one for a superior tribunal, and to give the salvors costs, of which they would otherwise be deprived by the statute." It is clear, therefore, that the county court judge, notwithstanding the agreement, may give a less sum, if, under the circumstances, the agreed sum appear to him not to be a reasonable amount; and, consequently, he had jurisdiction, and the rule to set aside the writ of prohibition must be absolute.

MELLOR, J. I am of the same opinion. The intention of the legislature, in other enactments giving jurisdiction to the county court, has been to give a more speedy and economical remedy to suitors both at common law and in equity, and the same intention is manifest here, only that the jurisdiction is given to the judge and not to the court, in order that he may be guided by the rules and principles which govern salvage cases. The main objection is, that this is not a case of salvage, because a specific amount has been agreed upon; but the cases shew that the amount may in many cases be re-opened. The other objection is one of mere form. When the jurisdiction is clear, the issuing the plaint and summons to appear in the county court, instead of before the judge, is at most a mere irregularity. But I do not see why this particular form, as prescribed by the rule, should not be adopted as well as any other. It does not follow that because the matter is thus brought before the judge in the county court, that any other consequence must follow, such as a hearing by jury, or an appeal to one of the superior courts, instead of to the Court of Admiralty, as the statute contemplates.

LUSH, J. I am also of the same opinion. At first, on reading the statute, I was strongly inclined to think that my Brother Willes was right in granting the prohibition. Sections 458—460 clearly refer to cases in which the question of reasonableness of the amount of salvage may arise, and no question could arise where there has been a binding agreement as to the amount. But

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I gather from the authorities that, notwithstanding an agreement, the court before whom the matter is brought may diminish it, or possibly, if the circumstances justify it, may increase the amount agreed to be paid. The result of the authorities appears to be, that the court is to be guided as to what is reasonable by the agreement of the parties, unless it was made under such circumstances as that it ought not be held binding. In *The William and John* (1) two points were necessary to the decision of the case; first, that the justices may award a different sum from that agreed upon, secondly, that the Court of Admiralty had no jurisdiction; and it follows that, in the present case, the county court judge had jurisdiction.

Rule absolute.

Attorneys for plaintiffs: *Young, Maples, Teesdale, & Nelson, for Lietch, Kewney, & Dodd, North Shields.*

Attorneys for defendant: *Shum & Crossman.*

May 11.

[IN THE EXCHEQUER CHAMBER.]

FITZPATRICK *v.* BOURNE.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Debtor and Creditor—Deed of Arrangement and Distribution—Priority of Payment—Inequality.*

By a deed of January, 1867, for the arrangement and distribution of a debtor's estate, after reciting that by a deed of December, 1865, the debtor's creditors had granted him a letter of licence to carry on his business of a colliery proprietor under the direction of inspectors, and that the inspectors might retain or require payment out of the estate of all costs, charges, and expenses in anywise relating thereto, and might raise any sum of money by way of mortgage of the colliery, and apply the money (amongst other things) in paying the costs, charges, and expenses incurred in carrying on the business and in raising the money, the debtor assigned his estate to a trustee to get in and realize the same, and after payment of the costs of the arrangement of 1865, and all costs, charges, and expenses thereinbefore recited or referred to as having been incurred by the inspectors or with their sanction for the benefit of the debtor's estate, to pay the residue rateably amongst the debtor's creditors:—

Held, affirming the judgment of the Queen's Bench, that the provision for

(1) Brow. & Lush. 49; 32 L. J. (P. M. & A.) 102.

the payment of the costs incidental to carrying on the business, and all expenses incurred under the deed of 1865, in priority to the debts of the other creditors, did not render the deed of 1867 invalid: for that they were all reasonable provisions, and such as the creditors at large ought themselves to have assented to.

ERROR by the plaintiff on a judgment of the Queen's Bench in favour of the defendant on a demurrer to a replication. (1)

Gray, Q.C. (*Dixon* with him), for the plaintiff. There are three classes of creditors on the defendant's estate: First, those who signed the deed of inspection; secondly, those who did not sign it; thirdly, those persons who became creditors after the deed of inspection was signed and during the carrying on of the colliery. They are creditors of the defendant and not of the inspectors, for if these creditors sought to enforce their claims, they would have to sue the defendant and not the inspectors: *Redpath* v. *Wigg*. (2) The very object of the deed is, that the inspectors shall incur no liability. The replication then shews that these debts were incurred three months after the execution of the first deed; that deed contained a letter of licence enabling the defendant to carry on the business only for three months. At the expiration of three months the deed was at an end, and all the parties remitted to their original rights, and everything the debtor did after that time was not binding on the dissentient creditors. There is no equitable lien in favour of the inspectors, as the Court below have held. The inspectors are not to take possession of any property under the first deed, as they themselves can incur no liability. The property remains in the debtor, and the debts incurred are the debts of the defendant, so that there is no ground on which to found an equitable lien. If the inspectors have no equitable lien, a preference is established; the deed then is void, and the judgment of the Court below cannot be sustained.

Quain, Q.C. (*A. Peel* with him), for the defendant, was not called upon.

KELLY, C.B. In this case the defendant, who carried on the business of a coal proprietor, having become insolvent, a deed of

(1) Ante, p. 233.

(2) Law Rep. 1 Ex. 335.

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inspectorship was executed in 1865, under which his then creditors agreed to grant him a letter of licence, by which he was to be permitted to carry on the business for three months, and this was to be done under the direction and control of certain inspectors, and various provisions are to be found in the deed for their protection. Although the inspectors were not themselves interested in carrying on the colliery, yet it is clear that whatever was to be done during the three months was to be done under their direction and control, and they had power for the purpose of securing themselves, to mortgage the colliery for any sums of money advanced and expenses incurred in the execution of the trusts of that deed. The defendant, in pursuance of the deed, carried on the business of the colliery,—he may or may not have contracted debts for the business,—but it is quite clear that he did incur considerable expenses in paying out an execution, the money for which was found under the direction of the inspectors, and also in making the colliery available for the purposes of the trusts of the deed. The three months having elapsed, other expenses were incurred, and the difficulties of the trader still continuing, he entered into the composition deed with his creditors which is now questioned.

It is objected that, as this last deed contains a clause that the expenses incurred under the former deed are to be paid in priority to the debts of the other creditors, by this means a preference is given to some creditors over others. In order to see whether this is so, we must look at the deed. It recites that since the last deed was executed, many attempts were made to sell the colliery and to raise money on the security of the same, all which attempts proved abortive in consequence of the lessor of the mines refusing to consent to an assignment, although he was made aware that a large price was offered; and then it recites the expenses which have been incurred under the sanction of the inspectors. Let us see if there is anything in the payment of these expenses at all analogous to a preference given to some over other creditors. The first item is for expenses incurred with the sanction of the inspectors in carrying out the trusts and provisions of the deed of 1865. It was the duty of the inspectors to carry out those trusts, and as these expenses were incurred by them for that purpose, no one can say that they ought

not to be paid. The next item is in defending certain proceedings instituted by the lessor of the collieries to recover possession of the same, and in advising with counsel as to the rights of the lessor, and in defending certain actions brought by creditors of the defendant after the deed had been registered, and in working the collieries by the inspectors. It was necessary to obtain possession of the estate so as to make it available for the creditors; it was absolutely necessary that the actions should be resisted. Then the next item is that the London Joint Stock Discount Company had issued an execution against the defendant under which the sheriff seized, and the inspectors agreed to pay the costs of the Discount Company and the costs of the sheriff in consideration of the execution being withdrawn, as a levying of the execution by the sheriff would have caused the forfeiture of the collieries; and these costs were paid by a person advancing the money at the instance of the inspectors. Here, again, as with the former items, all these expenses were incurred for the protection of the estate, and for maintaining that property to which the creditors looked for the payment of their debts. Was it reasonable or unreasonable that these expenses should be paid in full? Of course it was reasonable that they should. This is abundantly clear from the powers conferred on the inspectors; if the creditors had not agreed that they should be paid in full, it was competent to the inspectors to have mortgaged the colliery, and have prevented the creditors from realizing the estate. Just suppose at a meeting of the creditors on their refusing to sanction these payments in full, the inspectors saying, "Before you creditors shall touch one single sixpence of the assets, or one single deed relating to the property, you shall pay off these several items in full, or we will mortgage the estate." If the creditors were men of sense, of course they would acquiesce. It appears to me that the object of these provisions was to liberate the property and make it available for the creditors. So far from it being unreasonable that these expenses should be paid in full, it is most reasonable: and the deed is not void on any of the grounds on which it is impugned.

CHANNELL, B. I do not propose to add anything to the judgment of the Lord Chief Baron, but I would remark that the case

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Ex parte Tomlinson (1) goes a long way in affirmance of the judgment of the Court of Queen's Bench.

BRAMWELL and PIGOTT, BB., BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Hurford & Taylor.*
Attorneys for defendant: *Field, Roscoe, & Co.*

April 24.

WIGFIELD AND OTHERS, *v.* NICHOLSON.

Debtor and Creditor—Deed of Arrangement under 24 *&* 25 *Vict. c.* 134, *s.* 192—*Personal Covenant by Creditors to indemnify Trustees.*

By a deed purporting to be within s. 192 of the Bankruptcy Act, 1861, traders assigned all their estate and effects to trustees, for the benefit of all the creditors, with power to the trustees to call in and compound all debts, to sell all or any of the stock, works, &c., and in the mean time to carry on the business of the debtors for such period as they should think fit; and there was a clause that "the trustees should be indemnified out of the estate of the debtors, or otherwise by the creditors, in proportion to the amount of their respective debts, against and in respect of all transactions and personal engagements, matters, and things whatsoever, which they shall lawfully do or cause to be done, or enter into or order or direct in and concerning the management or conduct of the business":—

Held, that, as this clause imposed a personal liability on the non-assenting creditors beyond the loss of their debts, it was ultra vires, and the deed was not within s. 192.

CASE stated on an interpleader issue to try the right of the plaintiffs, as trustees under a deed executed by two partners of the name of Isaac Dodds, and T. W. Dodds, to certain goods seized by the sheriff under an execution on a judgment obtained by the defendant against the Dodds.

On the 27th of October, 1866, the fi. fa. was issued against the Dodds, who were carrying on extensive business in partnership as engineers and machinists at the Holmes engine works at Rotheram. On the 28th of October the sheriff entered the works and seized part of the stock in trade to the value of 212*l.*, the amount in the writ. The sheriff continued in possession, and on the

(1) 30 L. J. (Bkr.) 41; 3 De G. F. & J. 745.

1st of December, 1866, the Dodds executed a deed of assignment of all their property, real and personal, including that seized by the sheriff, to the plaintiffs as trustees on behalf of all their creditors, joint and several, including the defendant. The deed was executed by the debtors and the plaintiffs, and the requisite assents were obtained, and the plaintiffs took immediate possession of the works, and gave notice to the sheriff. And on the 26th of December, 1866, the deed was duly registered, &c., under the Bankruptcy Act, 1861.

A copy of the deed was annexed to the case. The deed was between the debtors of the first part, the plaintiffs of the second part, all the joint creditors of the third part, the separate creditors of I. Dodds of the fourth part, and of T. W. Dodds of the fifth part; and by it the debtors assigned all their property, real and personal, joint and several, including the works, engines, and working plant to the plaintiffs in trust, "that they shall at their discretion call in and collect such part of the said premises as shall consist of money, and shall sell and convert into money such parts of the said premises as shall not consist of money; with power for the trustees to accept any composition for any debts or moneys owing to the debtors or either of them, and to allow time for the payment of any of the said debts or compositions, &c.; and to allow any time or times for the payment of the whole or any part of the purchase moneys, either with or without taking security for the same, and generally upon and under such terms and conditions, and at such times, and in such manner, and in every respect as the trustees shall think proper. And shall out of the moneys to arise from such calling in, collection, sale, and conversion into money, as aforesaid, pay the expense of preparing, executing, and perfecting these presents, and all the expenses to be incurred in or about the execution of the trusts of these presents, or in respect of the premises, such payments and expenses to be apportioned rateably between the joint and the separate estate of the debtors, but so that no costs or expenses which shall relate exclusively to the joint estate, or the execution of the trusts thereof, shall be paid out of the separate estates of the one or either of them, and no costs and expenses which shall relate exclusively to the separate estate of the one or either of

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them, or the execution of the trusts thereof, or either of them shall be paid out of the joint estate, and shall pay and divide the clear residue of the moneys arising from the collection, sale, and conversion of the separate estate of each of the debtors among the separate creditors of each respectively, rateably, and in proportion to the amount of their respective debts, and the joint estate of the debtors, among all their joint creditors rateably and in proportion to their respective debts, subject nevertheless to the covenants and provisoes hereinafter mentioned. . . . Provided always, and it is hereby agreed and declared, that notwithstanding the trust for the sale and conversion hereinbefore contained, it shall be lawful for the trustees to postpone the sale, conversion, and collection of the whole or any part or parts of the said premises, expressed to be hereby assigned, for such time as the trustees shall in their absolute discretion think fit; and in the meantime and until the said premises respectively shall have been called in, collected, sold, and converted into money as aforesaid, under the trusts of these presents, it shall be lawful for the trustees at such discretion as aforesaid, to manage, conduct, and employ all or any part of the joint estate of the debtors, and to carry on and continue the business which the debtors have hitherto carried on, for such period as the trustees shall think fit, in the same manner and as fully in all respects as the debtors might have done if they had continued solvent, and had not executed these presents, and for such purpose to make such advance or advances out of the said joint estate, or the proceeds thereof, as to such trustees shall seem expedient. And at any time after the said business shall have been so carried on as aforesaid, to enter into any contract or agreement with any purchaser or purchasers for the absolute sale of such part of the said trust premises as shall have been employed in the conduct or management of the said business, as shall in anywise relate thereto, together with the goodwill of the said business for such price and upon such terms as to credit or otherwise, as to the trustees shall seem expedient, and as fully, and generally, and in all respects in like manner, as if such contract or agreement had been entered into under and by virtue of the powers of sale hereinbefore contained. . . . And it is hereby further agreed and declared, by and between the parties hereto, that the trustees shall

be indemnified, protected, saved harmless, by or out of the joint and separate estate of the said debtors and each of them or otherwise by the said creditors, according and in proportion to the amount of their respective debts against or in respect of all transactions and personal engagements, matters, and things whatsoever which they or any of them shall lawfully do or cause to be done, or enter into, or order or direct in, or concerning the management or conduct of the businesses of the said debtors, by virtue of or in pursuance of these presents, and that they the said creditors and every of them, their and his heirs, executors, administrators, and assigns, shall and will from time to time and at all times, allow and confirm the same in all respects." with a proviso that the joint and separate estates and creditors should only be liable to make good the trustees' losses or expenses in respect of the joint or separate estates respectively. The deed was expressed to be intended as a deed under s. 192; and the estate, &c., was to be administered as in bankruptcy; and there was a release by each class of creditors of their respective debts.

The question for the Court was whether, under the deed, the plaintiffs, as trustees, were entitled as against the defendant, the execution creditor, to the property seized.

Manisty, Q.C., for the plaintiffs. The only question is whether the deed is good within s. 192 of the Bankruptcy Act, 1861. The objection to the deed which is relied on by the defendant is that it contains a clause binding the creditors to indemnify the trustees. But that clause goes no further than would be implied where trustees undertake, at the request of the debtor and his creditors, to wind up the debtor's business, and in so doing to incur liabilities. The clause is binding on all the creditors in proportion to their debts; and there is therefore no inequality, which is the test of whether clauses in a deed are unreasonable or not. It is quite competent to the requisite majority of creditors to determine that the business shall be wound up or carried on under the inspection of trustees, and it may be necessary for that purpose to enter into new contracts, and thus incur liabilities, and unless the trustees are to be indemnified no one would be found to undertake the office. The Court will not inquire into the reasonableness of provisions which

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have the sanction of a majority of the creditors; the very fact of this sanction shows their reasonableness.

[BLACKBURN, J. *Bailey* v. *Bowen* (1) is expressly in the plaintiffs' favour, so far as that a power to enter into new contracts is within the scope of the statute, and also that the Court will not inquire into the reasonableness of clauses, if within the statute.]

R. G. Williams, for the defendant. Inequality, no doubt, is one test of reasonableness. But the question is, whether in a deed empowering trustees to carry on the debtor's business for an indefinite time, a clause binding all the creditors to indemnify the trustees to an unlimited amount (for there is no limit except so far as the proportion of the debts) is within the contemplation of s. 192. There is no power given, expressly or impliedly, to the requisite majority to impose an additional personal liability on the other creditors; the limit is the loss of their debt, as in the case of bankruptcy. In *Woods* v. *Foote* (2), a covenant that the creditors would indemnify the debtor against all liabilities on bills outstanding was held to vitiate the deed. *Oldis* v. *Armston* (3) is to the same effect; and it was held that the deed was invalid, although it was shewn that on the facts the covenant could have no operation against non-assenting creditors. In *Legg* v. *Cheeseborough* (4), *Lyne* v. *Wyatt* (5), and *Dell* v. *King* (6), it was held that an absolute release of their debts was either not binding on the non-assenting creditors, or if meant to be binding, was unreasonable. Here there is not only the possibility of the loss of their whole debt imposed upon the creditors, but also the further liability of having to indemnify the trustees.

Manisty, Q.C., in reply. The clause as to indemnity is necessary to the carrying on and winding-up of the business, and this distinguishes the case from those cited.

BLACKBURN, J. This is, no doubt, a very important question; but it lies in a very small compass, and I do not think any further time for consideration will assist us at coming to a right conclusion.

(1) Ante, p. 133.
(2) 1 H. & C. 841; 32 L. J. (Ex.) 199.
(3) Law Rep. 2 Ex. 406.
(4) 5 C. B. (N.S.) 741; 28 L. J. (C. P.) 209.
(5) 18 C. B. (N.S.) 593; 34 L. J. (C. P.) 179.
(6) 2 H. & C. 84; 33 L. J. (Ex.) 47.

By s. 192 a deed entered into between a debtor and his creditors, or a trustee on their behalf, relating to his debts and to his release therefrom, or the distribution, inspection, management, and winding up of his estate, is made binding on all the creditors, although they do not execute or assent to it. In the present case there is a deed relating to the distribution, winding-up, and management of the debtors' estate, and if there are outstanding contracts, it is most essential for the winding-up of the estate that the trustees should have full powers for carrying on the business; so far the deed is plainly within the statute, and the cases, of which *Bailey* v. *Bowen* (1) is the last, shew that the requisite majority of creditors have full right to enter into such a deed, so as to bind the minority; and as far as the estate of the debtors would be applicable, it is in the power of the majority to expend it in winding up the debtor's business. But in the present case the deed goes further; it gives not only power to the trustees to apply the whole estate to the purpose of carrying on the business, but if the trustees incur liabilities beyond what the estate can meet, there is a clause, which is to be binding on all non-assenting creditors, including those whose debts are under 10*l*., that the trustees are to be indemnified by the creditors according to and in proportion to the amount of their respective debts; so that the non-assenting creditors would not only lose the amount of their debts, but would be obliged to find further funds in excess of their debts to indemnify the trustees. This, as it appears to me, is what the clause amounts to; and it is beyond both the words and the meaning of the statute. The section contemplates deeds having provisions for the management and winding-up of the debtor's estate, and consequently the deed may authorize the carrying on of the trade, and to all expenses reasonably incurred the estate shall be applicable and be bound to indemnify the trustees; but if the deed go further, and bind not merely the debtor's estate, but also non-assenting creditors to enter into a speculation which may result not only in the loss of their debts, but in their being obliged to find further funds, then the deed is ultra vires, and more than the statute authorizes the assenting creditors to do. Whether or not clauses are reasonable it is for

(1) Ante, p. 133.

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the creditors to determine, provided they are within the power given by the act; but the Court has to say whether the clauses are within that power. In the present case I think the clause was beyond the power; that the deed is therefore not within the statute; and that there must, therefore, be judgment for the defendant.

MELLOR, J. I am of the same opinion. No doubt there has been a certain amount of fluctuation of opinion as to what constitutes reasonableness in the clauses of these deeds; but the Courts will not now enter into the reasonableness of this or that stipulation, provided the clause come within the purview of the act; but conceding that, we still must look and ascertain whether the clause in question is within the purview of the statute. Now, à priori it is not likely that the legislature would intrust the majority of the creditors to do more than deal with the debtor's estate; and anything in this deed, or this particular clause, which does not go beyond the estate would be within the statute; but when the deed seeks to impose a liability on all the creditors which may extend beyond their own debts and so beyond the debtor's estate, as in the present case, inasmuch as it is not likely to have been the intention of the legislature to confer this power, we must be satisfied that the words do enable the making of such a deed. I can find no such meaning in the words of the section, which are clearly limited to the dealing with the estate of the insolvent.

LUSH, J. I am also of the same opinion. It is clear to my mind that all the power given is to deal with the debtor's estate, and it is quite manifest that it was never intended that the majority of creditors assenting should have power to make arrangements imposing a liability on non-assenting creditors over and above the loss of their debts.

Judgment for the defendant.

Attorneys for plaintiffs: *Rickards & Walker.*
Attorneys for defendant: *Johnson & Weatheralls.*

THE QUEEN *v.* THE JUSTICES OF WESTMORELAND. 1868

April 30.

Quarter Sessions—Adjournment from a Sessions to the Sessions next but one—Prison Act, 1865 (28 & 29 *Vict. c.* 126), *s.* 24, *Notice under.*

By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 24, the necessity for the alteration or enlargement of an existing prison shall be proved by the presentment of two or more visiting justices, and the consideration of such a presentment shall not be entertained unless not less than three weeks' notice has been given in some newspaper circulating in the district of the prison authority, of their intention to take the same into consideration at a time and place to be stated in the notice. Due notice having been given that the presentment of justices as to certain gaols would be taken into consideration at the April quarter sessions for the county of W., the presentment was taken into consideration at those sessions, and it was resolved, that the matter should be referred to a select committee, to inquire into it and report to the October sessions. At the October sessions, the report was taken into consideration without any fresh notice having been given, and an order was made in conformity with the report:—

Held, that the power of adjournment was inherent in the Court of Quarter Sessions, and that it was competent to the court to adjourn the matter from the April to the October sessions; that they had in effect done so, though not formally; that a fresh notice for the October sessions was not necessary; and that the order was therefore valid.

Rule for a certiorari to remove into this court, for the purpose of quashing it, an order of sessions made at a general quarter sessions of the peace held on the 17th of October, 1867, in and for the county of Westmoreland, ordering that the gaol at Appleby be altered and adapted in accordance with the provisions of the Prisons Act, 1865 (28 & 29 Vict. c. 126 (1), and that sufficient

(1) 28 & 29 Vict. c. 126, s. 24:—"The necessity for any alteration or enlargement or for rebuilding of an existing prison, or for the building of a new prison, shall be proved, in the case of a municipal borough, by the certificate of the recorder, or chairman of quarter sessions where there is no recorder, and in any other case by a presentment of two or more of the visiting justices or other justices having jurisdiction within the district of the prison authority; and the consideration of such certificate or presentment shall not be entertained by the prison authority unless not less than three weeks' previous notice has been given in some one or more public newspaper or newspapers circulating within the district of the prison authority of their intention to take the same into consideration at a time and place to be mentioned in such notice, and in every case the sanction of one of Her Majesty's Secretaries of State must be obtained to any such alteration, enlargement, rebuilding, or building."

By s. 5:—"Prison authority," as respects any prison belonging to any county, are the justices in quarter sessions assembled.

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cells be provided for the reception of the whole of the prisoners within the county.

In the county of Westmoreland there are two gaols, one situate in the borough of Kirkley, in Kendal, and the other at Appleby. The Secretary of State having required additional prison accommodation to be provided, with a view of bringing the matter before the Court of Quarter Sessions, two presentments were made by the visiting justices respectively of the two gaols, to the effect that the provisions of the Prisons Act, 1865, could not be carried out at the gaols of Kendal and Appleby, according to the then existing arrangements, and that it was necessary materially to alter those prisons in order to comply with the provisions of that act.

These presentments, together with a notice from the clerk of the peace stating, "That it was the intention of the prison authorities at the general quarter sessions to be holden at Kendal, on Thursday, the 11th day of April, 1867, at 12.30, to take the same there and then into their consideration, were published in the Kendal papers in due time under s. 21 of 28 & 29 Vict. c. 126. At the quarter sessions holden at Kendal, on the 13th of April, 1867, the subject was brought under the consideration of the court, and a resolution was passed:—

"That a committee be appointed to consider the gaol question, to consult the government authorities, and to report upon the expediency of erecting one or two gaols in the county, and the probable cost thereof, and *to report to the October sessions.*"

The committee appointed by the last resolution met and agreed on a report to the October sessions, in favour of one gaol for the whole county.

The notice given by the clerk of the peace of the holding of the sessions in October, contained no mention of any intention to take into consideration the presentments, or any matter connected with the gaols.

At the quarter sessions which was held on the 17th of October, the report was presented, and, by a majority of the committee, recommended that the gaol at Appleby should be altered to meet the requirements of the new prison act. And a resolution was passed, "That the gaol at Appleby be altered and adapted, in accordance with the provisions of the new Prison Act, and that sufficient cells

be provided for the reception of the whole of the prisoners within the county."

Before the motion was put, it was objected that it could not be passed as a resolution, no notice having been given, that the question of gaol locality would be taken into consideration; but the objection was overruled, and an order of sessions made in conformity with the resolution.

This rule was then obtained at the instance of the justices of the borough of Kendal.

Maule, Q.C., and *Fawcett*, shewed cause. Due notice under s. 24 of 28 & 29 Vict. c. 126, that the presentments would be taken into consideration by the Easter sessions was given: at those sessions the matter was referred to a select committee, and adjourned to the Michaelmas sessions. The sessions had power to refer the matter to a select committee: *Rex* v. *Justices of Glamorganshire*. (1) It was proper that the information should be acquired out of the sessions. The sessions had also power to adjourn the matter from the Easter sessions to the Michaelmas sessions. This was decided in *Keen* v. *The Queen* (2), where all the authorities on the point are collected.

Manisty, Q.C., and *A. S. Hill, Q.C.*, in support of the rule. The Michaelmas sessions cannot entertain the consideration of the presentments, because no notice under s. 24 has been given that the subject would be taken into consideration at those sessions. A notice was given that the matter would come on for consideration at the Easter sessions, and at those sessions it was referred to a select committee to report to the Michaelmas sessions; and the resolution does not state that it shall then be taken into consideration. But the sessions had no power to adjourn the matter from the Easter to the Michaelmas sessions. They ought to have adjourned it to the July sessions, entered continuances, and then adjourned it over to the Michaelmas sessions. If the sessions have power to adjourn over an intermediate sessions, they might indefinitely postpone the consideration of any question they did not wish to discuss. It is laid down in Nolan's Poor Law, 4th ed. vol. ii. p. 536, "An adjournment of a sessions is not to be to a time

(1) 5 T. R. 279. (2) 10 Q. B. 928.

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beyond that fixed by 2 Hen. 5, c. 4, for holding another original sessions," and for this *Rex* v. *Grince* (1) is cited; and so in Dickenson's Quarter Sessions, at pp. 73, 74, it is stated, "If the indictment cannot be disposed of after a verdict of guilty, owing to the justices present being equally divided in opinion as to the sentence, or from any other cause operating on the court, so that no judgment is given, an adjournment of the session should be entered by the clerk of the peace to some day previous to or not later than that appointed for the next ensuing original general or quarter sessions;" and for this, 2 Hawk. P. C. 68; *Rex* v. *Grince* (2) are cited: "but if no such adjournment of the sessions, or, as it seems of the appeal or other matter itself only is in fact made, no subsequent sessions has any power to make an order in the case," citing *Rex* v. *West Torrington* (3); *Bodmin* v. *Warligen.* (4) It is clear, therefore, that the quarter sessions must adjourn to the next sessions, and that not having been done in the present case the order is bad.

[COCKBURN, C.J. *Rex* v. *Sussex* (5) seems to me directly in point, and is an authority to shew that the sessions may be adjourned to the sessions after the next sessions.]

COCKBURN, C.J. I think that this rule must be discharged. The facts appear to be, that due notice had been given of the matter to be brought before the quarter sessions. The court of quarter sessions, before which the question was brought in the first instance, resolved to refer it to the consideration of a select committee, which select committee was to report to the next Michaelmas sessions, which would not be the sessions immediately following. It is said that due notice is necessary to each sessions, because each court is a separate and independent court. I think that is not so with reference to any matter that has once been properly brought before the court of quarter sessions; because, although for some purposes each court of quarter sessions is an original court, yet as to a matter once brought before a court it is perfectly clear that there must be necessarily inherent in the court

(1) 2 Bott, 754, 6th ed.
(2) 19 Vin. Abr. 358.
(3) Bur. S. C. 293.
(4) 2 Bott, 756, 6th ed.
(5) 2 Bott, 770, 6th ed.

of quarter sessions a power of adjourning any matter of which they may be seised, to any time at which they may consider they will be in a better position to decide upon it. As good an illustration as any of that view is this: that whereas the 17 Geo. 2, c. 20, provides that an appeal against a poor rate or against an order, by a party aggrieved, must be made to the next general quarter sessions of the peace, yet we all know that the practice established from that time to the present, and sanctioned by all the courts of quarter sessions and by this Court, is, that if the grievance arises so short a time before the holding of the court of quarter sessions, to which, according to the words of the statute, the appeal must be made, as that there is not time to give the necessary notice of appeal, the court of quarter sessions always enters an appeal and respites it to the next quarter sessions, and that court becomes seised of it and deals with it, although the act of parliament has expressly enacted that the appeal must be to the next court of quarter sessions after the cause of grievance has arisen. It is clear that when this matter was brought before it the court can adjourn it to any subsequent court, and that being so it seems to be unimportant whether it is to the next court or to some future court, if it be more convenient to adjourn it to some future court. As to any supposed inconvenience or danger arising from the court of quarter sessions availing itself of this power of adjournment to get rid of any question, I think there is neither such inconvenience nor danger; because this Court would control their action, if necessary, and compel them to proceed with and deal with the matter. *Rex* v. *The Justices of Sussex* (1), shews that there need not be a formal adjournment of any particular matter before the court supposing that some course of proceeding is adopted by the court which virtually amounts to an adjournment; in that case the justices ordered a special case to be stated for the consideration of the Court of Queen's Bench, but by an oversight the court of quarter sessions adjourned before the counsel had settled the case. The Court there said: "When the justices have said that a special case shall be made, they virtually say that the cause shall be adjourned over till a case is made; and therefore the want of an adjournment or a respite is merely the omission of the clerk, and

(1) 2 Dott 770, 6th ed.

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may at any time be supplied." Therefore I think when the court of quarter sessions, instead of proceeding to dispose of this matter which is before them, direct that it shall go to a special committee to consider and report, and that that special committee shall at the next Michaelmas sessions report, that amounts to an adjournment of a particular matter, and therefore that there was an adjournment until the next Michaelmas sessions. I was somewhat struck with the view, that the resolution was that the matter should be referred to a committee to report to the next Michaelmas sessions, without proceeding to order that the matter should then be taken into consideration. But that is virtually included. A committee is appointed to report to a subsequent court, and then on the report of the committee the court will proceed to deal with the case as they think fit. That is enough. All was done that was required by the statute (28 & 29 Vict. c. 126, s. 24). Notice was given at the first inception of the matter—there was that which was virtually an adjournment of the consideration of the question until the Michaelmas sessions, and then it was taken into consideration. All the justices whose duty it was to attend could have attended at the April sessions, and if they had attended, would have known of the adjournment.

BLACKBURN, J. I am of the same opinion. [The learned judge read s. 24.] Therefore, before the consideration is taken up, three weeks' notice is to be given. In this particular case the prison authorities were the court of quarter sessions, and notice was duly given in the newspapers three weeks before the next sessions, in the first instance, of their intention to entertain the consideration of the presentment. They did entertain the consideration of the presentment, but they did not dispose of it at those quarter sessions before which it was brought. Now, the first thing that is obvious enough is, that if that court of quarter sessions, being the prison authority, had adjourned over two or three days, continuing the consideration in the same sitting, it could not have been necessary to give a fresh notice. It is very plain that the adjournment would be a sufficient notice to all persons to come to any adjournment of the court. But the court of quarter sessions holds these sittings four times a year; therefore the first court, although it may adjourn, is simply con-

tinued; the next court is the same court. Now, it has been determined that, although the sessions is not adjourned, yet if the matter is adjourned, the new sessions may take up that new matter. The case of *Keen* v. *The Queen* (1) settles that question conclusively, because Patteson, J., says, "The sessions have only one commission; so it is quite correct for the justices to adjourn a case from one session to another, because they are not advised what judgment to give.' Erle, J., pointedly says, "The sessions may adjourn the case, although the sessions itself is not adjourned." He uses those express words. Therefore the question would be, could the prison authority sitting at the first court of quarter sessions, when they sit again, adjourn the matter from themselves to the new court of quarter sessions? Certainly, they may adjourn from one session to another in any other matter, and I see no reason why they could not adjourn the consideration of these presentments.

Then comes the question, what, in effect, have they done? I agree that when the prison authority have entertained this matter, if they have dropped it, when they are about to resume it, a new notice ought to be given; but if the quarter sessions, having entertained the matter, said, we adjourn the consideration of the matter to another sessions, I am not able to see any reason why they should not do so. Then comes the question, have they done so? They have merely passed a resolution, that it should be referred to a committee to inquire and report, which report should be brought before them at the Michaelmas quarter sessions—that is the next session but one. First, is that an adjournment of the consideration of the matter? Of course it is not, in express terms, but in *Rex* v. *Sussex* (2), according to the phrase there used, they virtually adjourned the matter to the Michaelmas sessions, and any person who had it brought to his notice by advertisement that this matter was going to be entertained at the Easter sessions, might have known that it was to be resumed at the Michaelmas sessions; therefore, it is the same as if it had been most formally adjourned. Then it was argued, that although the sessions had power to adjourn from one sessions to another, yet the adjournment must be exclusively to the next sessions. I listened for any authority for this

(1) 10 Q. B. 928. (2) 2 Bott, 770, 6th ed.

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assertion, but I did not hear any cited. Certainly there has been no enactment to that effect. I quite agree that it would be desirable to adjourn to the next quarter sessions. Very seldom would it be that that would not be the right course. This is generally done; but where, in a case like this, it would be necessary to get the opinion of the committee, which would require more than three months to ascertain, it was better to give ample time so that the matter should be done thoroughly, and it therefore became prudent to adjourn it for six months. I do not see any reason why the court of quarter sessions, being a continuing court, and adjourning from one court to another, which is in terms what they did, should not do so. I do not see why it is to be contended that it is necessary that they should adjourn to the next quarter sessions. If the adjournment were made to prevent any further consideration of the matter, it could easily be set right; but if it is a bonâ fide adjournment, I see no reason whatever for saying that there is any strict rule of law which makes it void.

MELLOR, J. I certainly think that we ought not to exercise our jurisdiction to quash this order of sessions. It appears to be conceded that the jurisdiction of the sessions attached, and that the notice was properly given for the Easter sessions, and that therefore at the Easter sessions the justices were in a condition to entertain the consideration of this matter, and they did entertain it. But it appears that, from the want of necessary information which they thought might be useful to the ultimate determination of the matter, and which might be ascertained by a limited number of their body, they referred the consideration of that question to a select committee. It appears evidently a most convenient course to adopt, unless some law prevents it being done. Then, in the same resolution in which it is referred to the committee, it is directed that the report should be made to the ensuing Michaelmas sessions, passing over the Midsummer sessions. In point of fact, is not that, in reality, an adjournment of the further consideration of the matter until the Michaelmas sessions? It appears to me that that is the substance of what was done at the Easter sessions; and if so, the Michaelmas sessions were seised of the jurisdiction of the

matter to be entertained at those sessions. I should be extremely unwilling to interfere on the ground of any supposed irregularity in the mode of conducting the business, unless there were an excess of jurisdiction, or some circumstance had happened which made it a dropped matter. But if the sessions have not exceeded their jurisdiction, or if it be not a dropped matter, then they have full power at the Michaelmas sessions to entertain the question.

HANNEN, J. I am of the same opinion. The 28 & 29 Vict. c. 126, s. 24, only requires that notice shall be given before the matter is entertained—that is, entertained in the first instance; and no further notice would be required while it really and truly remained under consideration. If the matter had really dropped, then, no doubt, a fresh notice would have been necessary. But here in no sense could the matter be said to have been dropped; it remained under consideration by means of reference to a committee which was appointed. It is suggested that there ought to have been an entry to this effect, that the further consideration was adjourned until the later sessions. No authority is cited to shew that that is necessary, and I can see no reason why in principle it should be so. There was, in fact, an entry which directed that the matter should stand over until after one intermediate sessions had elapsed. But the objection is merely that it is not formally adjourned. The entry expresses as clearly as can be the intention that the matter should be taken up after it has had the further consideration given to it by the committee. It therefore appears to me that, in the absence of authority, there is no reason of convenience in support of the objection. For these reasons I concur with my Lord and my learned Brothers.

Rule discharged.

Attorneys for prosecution: *Gray, Johnston, & Mounsley.*

Attorney for defendants: *J. Kynaston, for G. R. Thompson, Appleby.*

1868
April 24.

TOMLIN AND OTHERS *v.* DUTTON AND MILLER.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), s. 192—*Deed of Arrangement between Debtors in Partnership and the Joint Creditors only.*

A deed of composition made between the members of a partnership and the joint creditors of the firm without any reference to the separate creditors of the different members of the firm, is not within s. 192 of the Bankruptcy Act, 1861; and is invalid against non-assenting joint creditors.

DECLARATION on a bill of exchange drawn by the plaintiffs to their own order, and accepted by the defendants.

Plea, that the defendants, as co-partners, being indebted to the plaintiffs and others, executed a certain deed. The plea then set out a deed purporting to be within s. 192 of the Bankruptcy Act, 1861. The deed was made between the defendants, described as co-partners, of the first part, the defendant Dutton of the second part, a surety of the third part, the creditors of the partnership assenting or executing of the fourth part, and the other creditors, if any, of the partnership, of the fifth part; and by it the defendant Miller assigned all his moiety of the partnership property to the defendant Dutton; and Dutton and the surety covenanted to pay a composition of 6*s.* 8*d.* in the pound on the partnership debts, in consideration of which the parties of the fourth and fifth part released the defendants from the partnership debts due to them respectively.

The plaintiffs demurred; and replied that each of the defendants was indebted to separate creditors.

The defendants demurred to the replication.

Lumley Smith, for the plaintiffs. The deed is invalid under s. 192 of the Bankruptcy Act, 1861, as it deals with the partnership creditors only; whereas s. 192 requires the deed to be for the benefit of the debtor's creditors, that is all the creditors, whether joint or separate. These deeds are analagous to bankruptcies, and there is no such thing as the bankruptcy of a partnership or firm; the bankruptcy must be of each of the individuals making up the partnership. "Creditors" must mean all creditors, and it was so

held, under the analogous enactment of 12 & 13 Vict. c. 106, s. 224, in *Ex parte Calvert.* (1)

[LUSH, J. The deed there professed to be between all the creditors, and the certificate only said that six-sevenths of the creditors of the partnership had signed. And that was the ground of the decision against the validity of the deed.]

In Lindley on Partnership, p. 1204, it is said: "Where the debtor is a partner, the deed must be for the benefit as well of the joint as of the separate creditors. It is obvious that a deed for the benefit of one class only can be of no avail against the other class: *European Central Railway Company* v. *Westall.* (2) And from the principle that to be valid under s. 192 a deed must be for the benefit of all creditors, a deed which provides only for one class cannot be binding on non-assenting persons even within that class." *Ex parte Glen* (3), is the converse of this case. The Lords Justices there decided that a deed for the benefit of the separate creditors of a debtor, who had also partnership debts, was not binding on a non-assenting separate creditor; and both Lord Cairns and Sir J. Rolt expressly say that "creditors" in s. 192, means all the creditors of the debtor, whether joint or separate.

The Court then called upon

T. Jones, Q.C., for the defendants. The reasoning of the Court against the deed in *Ex parte Glen* (3), is derived from the consequences that would follow from holding it valid, viz., that the separate estate might be swept away by the joint creditors, who were not bound by the deed, and it does not apply to the converse case, as the separate creditors cannot sell the joint property until they have paid off the joint debt.

[BLACKBURN, J. But both the Lords Justices proceed on the construction of s. 192, that "creditors" means all the creditors of the debtor.]

In the present case the firm is the debtor. The section talks of a deed made between the debtor and his creditors, or any of them.

Lumley Smith, in reply. There is no such definition in the act as would make "debtor" include a firm; on the contrary, "debtor"

(1) 3 De G. & J. 95; 27 L. J. (Bkr.) 42.

(2) Law Rep. 1 Q. B. 167.

(3) Law Rep. 2 Ch. Ap. 670.

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throughout is treated as an individual, while by the interpretation clause, s. 229, "creditor" shall mean also any two or more persons being partners.

BLACKBURN, J. The plea sets up a deed made between the defendants and the creditors of the partnership only; if that be a deed within s. 192 of the Bankruptcy Act, 1861, then the act has given a new power, and it rests upon those that rely on this authority, given by statute, and not known to the common law, to shew by what words it is conferred. Section 192 makes, under certain conditions, a deed entered into between a debtor and his creditors, or any of them, or a trustee, on their behalf, as binding *on all the creditors of such debtor*, as if they were parties to and had executed the deed. Now the literal sense of those words must be, that the deed is to be between and for the benefit of all the creditors, inasmuch as it is to bind all the creditors of such debtor. Mr. Jones says a firm may be substituted for debtor. It may be expedient that the legislature should have enabled joint debtors to make by the assent of a majority of the joint creditors a composition binding against the others; but in the present case the words used shew that the legislature did not intend it, and I confess that I cannot conceive that such an enactment would be right. It is sufficient to say looking at the statute that they have not given this power, as there are no words admitting of such a construction. Mr. Jones argued that the consequences would not be so mischievous as those pointed out in *Ex parte Glen.* (1) But, as I have already said, the ground of the decision in that case was, that the section by "creditors" meant all the creditors, whether joint or separate. There must be judgment for the plaintiffs on both demurrers.

MELLOR, J. I am of the same opinion. There may be reasons why the legislature might chose to give power to a partnership to make a deed of composition between them and their joint creditors. But an authority has been cited sufficient to shew that the words of s. 192 could not be read in such a sense as to create this power without creating great anomalies and inconvenient consequences.

(1) Law Rep. 2 Ch. Ap. 670.

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LUSH, J. I am of the same opinion. *Ex parte Glen* (1), is a direct authority on the construction of the words "creditors" in s. 192.

Judgment for the plaintiffs.

Attorney for plaintiffs: *S. H. Head.*

Attorney for defendants: *W. W. Wynne, for J. P. Arkwright, Chester.*

OWENS *v.* WOOSMAN.
OWENS *v.* JONES.

May 4.

Practice—County Court, Order for Trial in, under 30 & 31 *Vict. c.* 142, *s.* 10—*Jurisdiction of a Judge of a different Court.*

18 L.T. 139

By 30 & 31 Vict. c. 142, s. 10, in certain actions in the superior courts, the judge of the court in which the action is brought may make an order that the cause be tried in a county court, unless the plaintiff give security for costs to the satisfaction of a master, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court.

A judge of one of the superior courts, sitting at chambers for all the courts, although not a judge of the particular court in which the action is brought, has jurisdiction to make an order under the above section.

The order of the judge is open to review by the Court; and his decision is not final as to whether the plaintiff has a cause of action fit to be prosecuted in the superior court.

RULES calling on the defendants respectively to shew cause why the orders of Willes, J., of the 31st of March, by which the causes were ordered to be remitted for trial to the county courts of Montgomeryshire, holden at Llanidloes and Newtown respectively, unless within fourteen days the plaintiff give full security for costs to the satisfaction of one of the masters, should not be rescinded or varied.

The defendant Jones obtained a judgment against the plaintiff, in a plaint in the county court of Montgomeryshire, holden at Newtown, of which court the defendant Woosman is the registrar, for 21*l.* 15*s.* 7*d.*, on the 22nd of February, 1867, and an order was made for the payment of 2*l.* in a week, and 1*l.* monthly afterwards. By the practice of the court, under such

(1) Law Rep. 2 Ch. Ap. 670.

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an order the first monthly instalment would be payable twenty-eight days from the making of the order, and not from the day of payment of the 2*l.*; and would in the present case have been payable on the 22nd of March; the order served on the plaintiff was drawn up by one of the defendant's clerks, making, by mistake, the first instalment due on the 28th of March; the plaintiff paid the 2*l.* on the 28th of February; and the first monthly instalment not having been paid on the 22nd of March, on the 23rd of March Jones applied for execution, which was issued accordingly by one of Woosman's clerks, and the plaintiff's goods seized. Whereupon the plaintiff brought the present actions, and in his affidavit alleged that Woosman and Jones were acting in concert to oppress him, and that the causes could not be properly tried in the county courts named.

McIntyre shewed cause in the first action. The orders were made under 30 & 31 Vict. c. 142, s. 10 (1), and the chief objection which will be relied on by the plaintiff is, that Willes, J., not being a judge of this court, had no jurisdiction, the section confining it to a judge of the court in which the action is brought; but Willes, J., was acting as a judge of all the courts when he made the order; and the 11 Geo. 4, & 1 Wm. 4, c. 70, s. 4, and the 1 & 2 Vict. c. 45, s. 1 (2), clearly gave him power to make the order: *Palmer* v. *Justice Assurance Society.* (3)

Thesiger, for Jones, urged the same arguments, and contended further that the Court had no power to review the decision of a judge at chambers, when the matter or ground of the order is the want of proof of a certain fact, "to the satisfaction of the judge."

[BLACKBURN, J. The plaintiff must satisfy the judge at chambers, or on appeal satisfy the Court; the usual appeal from a judge at chambers to the Court is not taken away.]

(1) See the section, ante p. 160.

(2) By 11 Geo. 4, & 1 Wm. 4, c. 70, s. 4, every judge of the superior courts, to whatever court he may belong, is authorized to transact such business at chambers, or elsewhere, depending in any of the said courts, as relates to matters over which the said courts have a common jurisdiction, and as may, according to the course and practice of the court, be transacted by a single judge. And 1 & 2 Vict. c. 45, s. 1, after reciting the above, extends the jurisdiction in similar terms to matters over which the courts have not a common jurisdiction.

(3) 6 E. & B. 1015; 26 L. J. (Q.B.) 73.

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Denman, Q.C., and *Croome*, in support of the rules. The jurisdiction to make these orders is expressly confined to a judge of the court in which the action is brought; the contrast of the language of s. 10, with that used in ss. 5 and 7, where "a judge at chambers" is the form, shews this conclusively. In *Palmer* v. *Justice Assurance Society* (1), the judge had a merely ministerial function to perform. The 11 Geo. 4, & 1 Wm. 4, c. 70, s. 4, and 1 & 2 Vict. c. 45, s. 1, only apply to the jurisdiction exercised by a single judge, according to the course of practice of the court, and cannot apply to a new jurisdiction confined expressly to a judge of the particular court. If the defendants were actuated by malice as the plaintiff alleges, he has a good cause of action, and the cases ought not to be heard in a county court; and though by 19 & 20 Vict. c. 108, s. 60, no person is to be made a trespasser, for acting under a warrant, by reason of any informality in the proceedings, yet an action is still reserved if the plaintiff can shew special damage. At all events, the Court will vary the orders so far as sending the causes to be tried in a district in which the same judge is not the judge. The legislature, by enacting in 19 & 20 Vict. c. 108, s. 21, that in an action against an officer of a county court, the summons may issue in any adjoining district, the judge of which is not the judge of a court of which the defendant is an officer, recognize the impropriety of the action being tried by a judge whose officer the defendant is.

COCKBURN, C.J. I think these rules must be discharged, except so far as changing the county court to which the causes should be remitted for trial. As to the jurisdiction of my Brother Willes to make the order, it is said that s. 10 intended to confine the jurisdiction to a judge of the particular court in which the action is brought, and though my Brother Willes was sitting and acting as a judge of this court, yet not being a judge of this court he had no jurisdiction. I think we must assume the legislature to have made this enactment with the knowledge of the previous statutes of 9 Geo. 4, & 1 Wm. 4, c. 70, and 1 & 2 Vict. c. 45; and it would be extremely inconvenient to put the narrow construction on the section contended for on behalf of the plaintiff. The judge of any of

(1) 6 E. & B. 1015; 26 L.J. (Q.B.) 73.

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the courts when sitting as a judge of a particular court is de facto a judge of that court. Upon the merits, as far as I can gather, these are very fit cases to be tried in a county court; there is nothing shewn either in the magnitude or importance of the interests involved, or even of any difficulty in point of law, to satisfy us that the plaintiff has a cause of action fit to be prosecuted in the superior court. But I think it would be more satisfactory if the place of trial were changed to a neighbouring and independent district; and the orders will therefore be varied so far as sending the cases for trial at the Oswestry court.

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BLACKBURN, J. I am of the same opinion. An order in a cause is and was always made in the court in which the action is brought. Formerly it must have been made by a judge of the particular court, but by two statutes a judge of any of the superior courts may act as the judge of either of the other courts; and the legislature must be taken to have meant, by "a judge of the court in which the action is brought," a judge sitting at chambers and acting for that court. No doubt the language is more precise and not so general as in other sections, and if any conceivable object could be shewn to be gained by confining the jurisdiction to a judge of *the* court, and no other, we might be induced to put the narrower construction on the section. But as the legislature use language which has been held not to convey the narrow meaning, and if they had intended it might have used different language, I think, especially after the new arrangement for one judge to act for all the courts, there cannot be the slightest doubt that the larger interpretation must prevail. As to the other points, I do not agree with Mr. Thesiger that the judge being satisfied is final: when there is an appeal from one court to another, the court of appeal must be satisfied also; and if we were satisfied on the affidavits that the plaintiff had a cause of action fit to be prosecuted in the superior court, I think we should be bound to rescind my Brother Willes' order. But, after hearing the arguments, I am anything but satisfied of this.

HANNEN, J. I am of the same opinion. The words used in 7 & 8 Vict. c. 110, s. 68, are "an execution may be issued by leave

of the court, or a judge of the court in which such judgment shall have been obtained," and in *Palmer* v. *Justice Assurance Society* (1) this Court held that a judge of another court could grant the leave, and the words are quite as strong as, if not stronger than, the present against such a construction; and, no doubt, the words are very specific, but they may be interpreted to mean that the judge must be acting as a judge of the particular court at the time he makes the order. That is a most convenient rule, and must be adopted, unless some great necessity be shewn for a contrary rule. In the present case, my Brother Willes has not been satisfied that the plaintiff has a cause of action fit to be prosecuted in a superior court; we have power to control and review the decision of the judge at chambers; but there must be a very strong case made out to induce the Court to interfere. The rules will be absolute to vary the orders, by ordering the causes to be remitted to be tried in the county court of Shropshire, holden at Oswestry, and discharged as to the rest, without any costs on either side.

Rules accordingly.

Attorney for plaintiff: *O. W. Lloyd.*

Attorney for defendant Woosman: *J. E. P. Stevenson, for Woosman, Newtown.*

Attorneys for defendant Jones: *Gregory, Rowcliffe, & Rawle, for J. Jones, Newtown.*

(1) 6 E. & B. 1015; 26 L. J. (Q.B.) 73.

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April 22.

THE QUEEN, on the Prosecution of THE OVERSEERS OF THE TOWNSHIP OF OLDHAM and Others, Respondents; *v.* THE MAYOR AND CORPORATION OF THE BOROUGH OF OLDHAM, Appellants.

Poor-Rate—Municipal Corporation—Non-rateability of Corporate Property under proviso in 4 & 5 Vict. c. 48, s. 1.

By 4 & 5 Vict. c. 48, s. 1, it is enacted that the municipal corporations in schedules A and B of 5 & 6 Wm. 4, c. 76, shall be rateable in respect of their occupation of corporate property as if it were not corporate property; provided that where such property lies in any parish which is situate wholly within the limits of a borough named in the said schedules, and in which borough the poor are relieved by one entire poor-rate, the exemption of such property from rateability shall continue as if this act had not passed:—

Held, that this was an affirmative enactment that property so situate should be exempt, and the exemption therefore continued, notwithstanding that the decisions which had originally created the exemption of corporate property were overruled by *Jones* v. *Mersey Docks* (11 H. L. C. 443; 35 L. J. (M.C.) 1).

Held, also, that the Union Chargeability Act (28 & 29 Vict. c. 79) did not affect this exemption of corporate property in a parish in a union.

On an appeal to the Lancashire quarter sessions, by the Mayor and Corporation of Oldham, against a poor-rate for the township of Oldham, in which the corporation were rated in respect of the occupation of corporate property, the sessions affirmed the rate, subject to a case.

A charter of incorporation was granted to the borough of Oldham, in 1849, under 5 & 6 Wm. 4, c. 76; and by 13 & 14 Vict. c. 42, the charter was confirmed.

The borough of Oldham is co-extensive with the township of Oldham.

Before the passing of the Union Chargeability Act, 28 & 29 Vict. c. 79, one entire rate was made and levied for the relief of the poor of the township of Oldham upon the rateable property therein, but exclusive of all the property the subject of this case.

The township now contributes to the relief of the poor as one of eight townships forming the Oldham Union, according to the rateable value of the property comprised therein, to a common fund for the relief and maintenance of the poor, whether in or out of the workhouse, pursuant to 28 & 29 Vict. c. 79.

The corporation of Oldham are possessed and are the occupiers

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of the property rated, which is wholly situate within the borough and township of Oldham; and consists of waterworks, gasworks, police-stations, baths, &c., &c., town hall, &c.; and it is to be taken for the purposes of the case that the property is rateable under 43 Eliz. c. 2, s. 1, and that the occupation is capable of yielding a net annual value or clear rent over and above the usual deductions; and that the property is occupied for municipal purposes.

The borough of Oldham comes within the proviso of 4 & 5 Vict. c. 48, s. 1; and as the property rated lies in a township which is situate wholly within the boundaries of the borough in which, up to the passing of the said act, the poor were relieved by one entire rate, the appellants maintain that their property is still exempt from the poor-rate, by virtue of the said proviso, notwithstanding the passing of the 28 & 29 Vict. c. 79.

The question for the Court was, whether the appellants are liable to be rated in respect of the said property.

F. M. White, for the respondents. Since the decision in *Jones* v. *Mersey Docks* (1), this property would be clearly rateable, were it not for the proviso in 4 & 5 Vict. c. 48, s. 1 (2), and the appellants contend that property within the proviso is still exempt

(1) 11 H. L. C. 443; 35 L. J. (M. C.) 1.

(2) 4 & 5 Vict. c. 48, s. 1, "Whereas the municipal corporations of cities and boroughs named in the schedules (A) and (B) annexed to 5 & 6 Wm. 4, c. 78, have been held not to be liable by law to be rated to the relief of the poor in respect of any lands, tenements, and hereditaments, being the properties and in the occupation of such municipal corporations, by reason that the income arising therefrom is applicable to public purposes only; and it is expedient that such municipal corporations should, nevertheless, in some cases, be rateable and be rated to the relief of the poor in respect of such property: Be it therefore enacted, that the said municipal corporations named in the said schedules shall, from and after the passing of this act, be rateable and be rated to the relief of the poor in respect of lands, tenements, and hereditaments, being the property and in the occupation of such municipal corporations, as if such lands, tenements, and hereditaments were not corporate property, any law, usage, or custom to the contrary notwithstanding: Provided always, that where such property lies in any parish which is situate wholly within the boundaries and limits of a city or borough named in the said schedules, and in which city or borough the poor are relieved by one entire poor rate, or in which city or borough the poor within the boundaries or limits thereof, as existing for municipal purposes at the time of passing the said act, were then relieved by one entire poor rate, the exemption of such property from rateability shall continue as if this act had not passed."

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from rateability, notwithstanding *Jones* v. *Mersey Docks* (1); but all the proviso says is that the state of the law as to the particular property shall remain as if this act had not passed; and when *Jones* v. *Mersey Docks* (1) decided that the law was that corporate property ought to be rated, and not as had been decided in *Reg.* v. *Mayor of Liverpool* (2), and *Reg.* v. *Exminster* (3), to remedy which decisions the statute was passed, then the exemption to rateability, inter alia, of corporate property, which had previously existed, ceased, and with it the exemption of this particular class of property.

[MELLOR, J. My Brother Hannen suggests that the section taken with the proviso is an expression of the opinion of the legislature that some corporate property should be rateable, and some should be exempt.]

There is no positive enactment as to the exemption; and it is not said "notwithstanding the passing of this act," but "as if this act had not passed;" now if the act had not passed, there would now be no exemption. Secondly: Oldham is not within the proviso, not being a borough mentioned in schedules A or B of 5 & 6 Wm. 4, c. 76, but incorporated since, under s. 141, by charter which was confirmed by 13 & 14 Vict. c. 42. Lastly: by the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 1, a parish is no longer separately chargeable with the relief of its own poor, but the charges are to be charged upon the common fund of the union; and therefore, on the passing of that act, this property, if before exempt, ceased to be within the proviso.

Quain, Q.C. (*Kemplay* and *Edwards* with him), for the appellants. The second point is not open to the respondents, as it is distinctly stated in the case that the borough of Oldham comes within the proviso of 4 & 5 Vict. c. 48; however, it is immaterial, as 16 & 17 Vict. c. 79, s. 2, extends the provisions of 4 & 5 Vict. c. 48, and of the other acts which apply to corporations in schedules A and B of 5 & 6 Wm. 4, c. 76, to all after-created municipal corporations. [On the other points he was not heard.]

MELLOR, J. I am of opinion that this property is exempt from rate-

(1) 11 H. L. C. 443; 35 L. J. (M. C.) 1. 11 Jur. N.S. 740

(2) 9 A. & E. 435.

(3) 12 A. & E. 2.

ability, and that the order of sessions affirming the rate was wrong. The 4 & 5 Vict. c. 48, was founded on decisions in which property of municipal corporations occupied by them for municipal purposes had been held not rateable; and it was supposed at that time that this Court had conclusively decided this; and the legislature, thinking that such an exemption was not expedient, enacted that such municipal property should not be exempt in general; but the legislature also thought it proper to exempt such property coming under certain specified conditions; and the property in question comes under that exemption. But it is said, on behalf of the respondents, that the only exemption that could be contended for was that created by the decisions which had been overruled by *Jones* v. *Mersey Docks* (1), and that when those cases fell the exemption fell with them; but that is not so; the legislature chose to alter what was then supposed to be law as to corporate property in general, and expressly provided also that certain property should be exempt. The legislature has so enacted, and we have no power to set the statute at nought, even if we thought it expedient that the exemption should not continue. Oldham is not a borough in schedule A or B of the Municipal Reform Act, but it is placed in the same position as if it were, by 16 & 17 Vict. c. 79, s. 2. The only other objection is that sought to be raised under the Union Chargeability Act, 28 & 29 Vict. c. 79; but that statute does not affect the question; it was not intended to make property rateable which had been exempt before, nor does it impose any new mode of levying the rate, but enacts only (s. 1) that each parish shall no longer be chargeable with the relief of its own poor separately; but the contribution of each parish to the common fund is (s. 15) to be by an equal pound rate on the property in each parish rateable to the relief of the poor according to the law in force for the time being.

LUSH, J. I am of the same opinion. The 16 & 17 Vict. c. 79, puts Oldham and other boroughs not in schedules A and B in the same position as boroughs in those schedules, and so brings them within the proviso of 4 & 5 Vict. c. 28, s. 1; and on the proper construction of that statute, the proviso appears to me to be a

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

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positive expression of the will of the legislature that corporate property situate in a parish wholly within the boundaries of a borough shall continue exempt from rateability to the poor-rate; and the reason is obvious, that whatever amount the corporation might have to pay towards the poor-rate would have to come out of the borough fund, and that would have to be repaid to the corporation in the shape of a borough rate levied on all the property in the parish. I cannot, therefore, but think that this proviso is an affirmative enactment that property situate as the property in question shall not be assessed to the poor-rate. Then 28 & 29 Vict. c. 79, has no effect to qualify or alter rateability to the poor-rates. The parishes in a union now contribute a proportion towards the common fund of the union, instead of each separately relieving their own poor; but the amount to be paid to the common fund is still to be levied on the same persons and property as heretofore.

HANNEN, J., concurred.

Order of sessions and rate quashed.

Attorney for appellants: *James Holt, for Ponsonby, Oldham.*

Attorneys for respondents: *Bower & Cotton.*

May 2.

THE TALARGOCH LEAD MINING COMPANY, APPELLANTS; THE GUARDIANS OF ST. ASAPH UNION, RESPONDENTS.

Poor-rate—Rateability of Watercourse connected with Lead Mine—43 Eliz. c. 2.

The appellants, for the purpose of working the machinery connected with a lead mine, diverted a stream from its natural course, paying the owners for such diversion, and paying certain small sums for the occupation of the land by the watercourse. The watercourse was about a mile and a half in length, being partly open, partly tunnelled, and for about 350 yards in pipes:—

Held, that the appellants were rateable to the poor-rate in respect of the occupation of the watercourse at the value of the land enhanced by its capability of conveying water; and that it was not exempt from rateability by reason of its connection with a lead mine, though that is not rateable under the 43 Eliz. c. 2.

Rex v. *Bilston* (5 B. & C. 851) discussed.

THE Talargoch Mining Company appealed to the St. Asaph assessment committee against the rating of their property in the valuation list for the parish of Dyserth.

The description of the property was, "land, watercourse, land covered with water, way leaves, land for laying water pipes on"; quantity two acres.

The assessment committee decided that the property was rateable; on which the company gave notice of appeal to the quarter sessions against the next rate made for the parish, on the grounds, inter alia, that the company are assessed at a greater sum than they ought to be assessed at; that the company are assessed for property which was not in their occupation at the time of making the rate, and for other property which is not liable to be assessed to the relief of the poor; and that the property in respect of which the company is rated is by law exempted from such rate.

The following case was then stated under 12 & 13 Vict. c. 45, s. 11:—

In the parish of Dyserth there is a lead mining company known as "The Talargoch Mining Company, Limited;" and, according to the memorandum of association, "the objects for which the company is established are the raising, working, and selling of lead ore and other minerals upon and under a certain mine known as Talargoch." From this mine between 300 and 400 tons of lead ore are raised monthly.

A spring, rising in the adjoining parish of Curn, used to run along its natural course in the parish of Dyserth, and turn a corn-mill, the property of Mr. S. Conway; but the company requiring the water to work an hydraulic pumping engine on the mine, and for other purposes, took a lease of the mill and diverted, by an artificial and new watercourse of about a mile and a half in length wholly within the parish, so much of the water as was required for the purposes of the mine, after providing sufficient for the inhabitants along the stream. When the new watercourse was originally constructed, the company were not seised or possessed of any of the lands through and over which the water flowed, but they paid the occupiers of those lands an annual sum for conveying the water over their lands. In consequence, however, of the dissatisfaction expressed by one of the principal occupiers on the line who underlet to the company, the company were induced to purchase the interest of the superior landlord in the premises, and then let the whole of the farm to the occupier. To some other riparian

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occupiers the company, however, still make annual payments for the lands respectively occupied by their watercourse; the total amount paid to all the occupiers, including the occupier of the farm belonging to the company, being 7*l.* 7*s.*

The rateable value of the land in which the water flows is for agricultural purposes 2*l.*

The new watercourse is partly open and partly tunnelled, and the whole, with the walls, sluices, flood-gates, pipes, and other works connected therewith, are from time to time cleansed, repaired, renewed, maintained, and kept in order by the company. At the terminus and destination near the mine, the water for about 350 yards is conveyed by large iron pipes, which pipes were laid down so as to lead in the first instance to the hydraulic engine. In consequence of the uncertain supply of water in the summer, the company found it necessary to put down a steam pumping engine; and from 1862 to the present time the hydraulic engine has not been in use, but the pipes still convey the water to the mine.

A portion of the water (a six-inch pipe) is conveyed through the pipes that were put down for the hydraulic engine to feed a steam pumping engine, and which water, after supplying this engine, returns into the natural watercourse. The remainder of the water which flows along the artificial course passes into a pool to supply another steam pumping engine, and to work a waterwheel, which winds the ore and refuse out of the mine. Attached to the wheel is a pair of crushers to crush the ore, and also a circular saw, which is used to saw timber used in the mine, and for other purposes, such as sawing boards for the repair of carts used in the mine, and upon a few occasions as and when required for the repair of the buildings of the farm belonging to the company. After passing over the waterwheel the water is used to wash and clean the ore, in order to make it merchantable, and it then returns into the natural course. According to the custom of the trade, the ore is crushed, washed, and cleansed before it is removed from the mine.

Whilst the company held the water corn-mill before mentioned they paid 100*l.* a year for it, and they were rated at 100*l.* for the mill, and paid their rates; but the lease having expired, they have now made a fresh arrangement with the landlord, by which they

have given up the mill, and pay him 100*l.* per annum for the flow of water to their mine. The occupiers of the mill-house and the land attached to it are now rated at a reduced rateable value, consequent on the loss of the flow of the water to the mill.

The parish officers of Dyserth considered that the watercourse is enhanced in value by the water flowing on it, and was subject to be rated to the relief of the poor, and have rated the two acres of land covered with water at 100*l.* The assessment committee considered, on the above facts, that the company were rateable, and have rated them at 100*l.*

The question for the Court was, whether the company is liable to be rated for the land over which the water flows; and, if so, whether to the amount of the agricultural value of the land, or to the amount of its enhanced value by reason of its being converted into a watercourse, and applied to the purposes above set forth.

Watkin Williams, for the respondents. It must be conceded that the lead mine itself is not rateable, the statute of 43 Eliz. c. 2, only mentioning coal mines; but that does not prevent any rateable subject matter in connection with the mine from being rateable: *Rowls* v. *Gells.* (1) The occupation of real property by means of mains through which water passes is rateable in itself: *Reg.* v. *West Middlesex Waterworks Company.* (2) The appellants here are in the exclusive occupation of the watercourse whether open or closed up with pipes or brickwork, and there is a material distinction between a mere easement and the actual occupation of land. In the one case, if rent is paid for the right, the person to whom it is paid will be liable to have the rate on the land increased by this enhanced value; in the other, the person enjoying the occupation is the person rateable. Here the appellants have the occupation of the land by means of their culverts, pipes, &c. But it is said that this watercourse is not rateable, as being accessory to the lead mine; and *Rex* v. *Bilston* (3) will be relied on. But that case, if supportable at all, must be on the ground that the engine was part and parcel of the mine. The fact that a rateable subject-

(1) Cowp. 451.

(2) 1 E. & E. 716; 28 L. J. (M.C.) 135.

(3) 5 B. & C. 851.

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matter is connected with another not rateable does not render the former less rateable, as long as the two are kept distinct on the rate: *Rex* v. *Cunningham.* (1) An iron tramway is rateable, and it is not the less rateable that it leads to a mine which is not rateable. Lastly, what is the value of the occupation of these two acres of land covered with water? The mere agricultural value, or the value enhanced by the capability of carrying water? Clearly the latter.

Mellish, Q.C., for the appellants. It does not appear that the appellants have any exclusive occupation, at least of the open watercourse; and, as to the pipes and works, how is this case distinguishable from *Rex* v. *Bilston?* (2) Bayley, J., says: "Here a person working an (ironstone) mine on his own land has erected an engine for the purpose of working that mine, and which is of no other use. The occupier of the mine, as such, is not rateable under the provisions of 43 Eliz. c. 2. In many such mines there are railroads underground, which greatly enhance the value of the mine, and therefore of the land, but they cannot be rated, and on principle they are on the same footing as this engine. This is a mode of drawing the water from the mine. The railroad is to facilitate the conveyance of the ore to the foot of the shaft. Each is of use in carrying on the mining operations, but of no other use." Secondly, the committee seemed to have taken what was paid, viz. 100*l.*, for the diversion of the watercourse, as the basis of their calculation. This is clearly wrong.

W. Williams, in reply. Bayley, J., treats the engine as part and parcel of the mine, as it would have passed under a conveyance or lease of the mine and machinery; and what he says as to the tramroad, if above ground, is answered by the case of *Rex* v. *Bell.* (3)

[BLACKBURN, J. That was the case of a tramway to a coal mine itself rateable, so that the distinction did not arise.]

The case distinctly shews the appellants are in the occupation of the watercourse; and, as to the value, the fact of the committee putting it at 100*l.* is a mere accident, and has nothing to do with the 100*l.* paid for the diversion. At all events, the principle, and not the quantum, is all that is open in the present case.

(1) 5 East, 478. (2) 5 B. & C. 851. (3) 7 T. R. 598.

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COCKBURN, C.J. The only difficulty we have is in determining what is the real question submitted to us. If it is as to the rateability of this watercourse as accessory to the working of a lead mine, the answer is, that although the mine, being a lead mine, is not rateable, and, according to *Rex* v. *Bilston* (1), machinery merely wanted for the mine is accessory to the working, and is therefore not rateable any more than the mine itself, yet we are dealing with a watercourse passing over a considerable extent of land, and the works are only thus connected with the mine; and we must look at the case as one in which the value of the land is increased by the existence of the watercourse, and its capability of carrying water to the mine; and in this form I entertain no doubt that the land is rateable. The land covered by water is the subject of the rate. On the other hand, if it had been intended—as one, perhaps, might gather from the statement of the case—to rate the watercourse in respect of the 100*l.* which is paid annually, not for the land covered by water, but for the right to divert the water from its original purpose to working the mine, I entirely agree with Mr. Mellish that that would not be the proper subject of a rate. It is an entirely different thing. The 100*l.* is a compensation, though given for the diversion of the water. It is not a rent paid for the occupation of the land with water on it. Getting rid of these two difficulties, the question then is whether, in so far as the land is covered by this watercourse for the conveyance of the water from the place where it was originally taken to the mine, it is rateable, and I think all that is properly rateable. The value of the land is increased by the buildings or the constructions which have been erected on it, and by the presence of the water brought over it, in respect of which rent is paid. Supposing, instead of the present state of things, the company had neither the occupation of the land, nor the buildings which they had constructed for the purpose of the watercourse, but all that belonged to the proprietor of the adjoining land, and the company wanted the use of it, they then would have to pay so much rent to the adjoining proprietor for the use of the watercourse, and the necessary things accessory to it, and that rent would have been the real value of the land covered by water. Assuming the rate is

(1) 5 B. & C. 851.

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made on that basis, I think it would be quite right, and Mr. Williams says that is to be assumed to have been the basis on which the rate was made, and there is nothing in the case to negative that. It is true, they have got the value of 100*l.* in their mind by way of compensation at the time they made the assessment, and they may have measured the value by the 100*l.* paid for the diversion. If so, they certainly did proceed upon a wrong basis; but there is nothing to shew it, and it may well be that the fair value of this occupation to the company is 100*l.* Looking at the extent of the land occupied, and the buildings to which Mr. Williams has referred, it may be that 100*l.* is the fair value. If it is not, the parties making the rate ought to understand, they ought not to take into consideration the 100*l.* paid for the right to divert the water, but they should consider what is the value of the land and buildings over which, and through which, the water comes.

BLACKBURN, J. I quite agree with what my Lord has stated. The first great question is, is the company, or the persons rated here, in occupation of the land over which the water flows; are they in occupation of the watercourse, or of the bricks and other things built into the watercourse? If they are the occupiers of the land, and have the sole and exclusive possession of it, they are properly rated; but if they have merely an easement over the land, a right to carry water, without occupation, then they would not be rateable. If rent were paid to the owners of the land in respect of this easement it would render them liable to be rated, but the company would not be rateable. This is a question of fact, whether they are occupiers or not. As far as I am able to see, the company appear to me to be liable as occupiers; I do not see any serious distinction between gas companies and water companies, they both occupy the land with pipes. I cannot see the distinction as to pipes and the rest of the watercourse; and I think in the case of watercourses the fact that there is a brick building or culvert would tend to lead to the conclusion the company were occupiers of that also; I do not think it is very material as to the rate, whether the water is drawn in 300 yards of pipe or in the whole mile and a half of watercourse; the greatest difficulty is,

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on what is the rate to be made. The contention seems to be, that inasmuch as the water is carried for the purpose of aiding and assisting in working the lead mine, as the lead mine itself is not rateable, neither are the accessories. But the lead mine is not rateable, not because it is exempted from the rate, but simply because the Statute of Elizabeth, which imposed the duty on occupiers of land, included only coal mines, and it has been held, rightly or wrongly, that it does not impose the duty on mines other than coal mines. But the contention here is, that inasmuch as the water is brought for the purpose of the lead mine, any increased value in the occupation of the land by reason that it brings the water to the mine, is not to be taken into account. In *Rex* v. *Bilston* (1), it was not decided, as I understand the case, that a watercourse is not rateable, but that an engine used for the purpose of raising the water is not to be considered as rateable. I do not find there is anything to shew whether the engine occupied land at all. If it occupied land, I must acknowledge I should hesitate before I should feel bound by the decision. And I merely observe that all that can be said to be decided is, that the engine was part and parcel of the mine, and so was not rateable. In the present case there is no question of that kind. It can never for a moment be said that this watercourse is part of the mine. Its value is no doubt that it affords facility to the occupation of the mine, and the works attached to it, but the watercourse is part of the soil, with its value enhanced if you can carry water. It affords facility for carrying water to the mine, and what we have to consider is, taking the particular assessment, what would be the rent which would reasonably be expected from a tenant from year to year? We often have to apply that principle to a thing which is not let from year to year; and what we have to consider is, what is the annual value of this. If this piece of land on which the watercourse is were in possession of another, he could stop the flow altogether. But suppose he bargains with the company what rent they would pay for the whole of this watercourse, this land covered with water, and so one would get at what they would have to pay. That would be quite independent of the value of the water itself. Various elements would come in in settling it, which have been

(1) 5 B. & C. 851.

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called by Sir Robert Peel "the higgling of the market." It would have to be considered, is there any other course to be got cheaper? Possibly the company could get land much cheaper, but they would still have to consider, not merely the rent for the land, but what it would cost to get the landlord to expend money in putting in culverts and pipes, that would be more or less an addition. Therefore a man would, rather than be deprived of an existing watercourse, pay a higher rent than the merely abstract value for the land and water.

In the present case the question asked is, supposing the watercourse is rateable, whether the amount is to be the amount of the agricultural value of the land, or the amount of the enhanced value by reason of its being converted into a watercourse. For the reasons I have mentioned it is the amount of its enhanced value.

The case is not so stated as to make it quite clear on what rule or principle the committee went, it may be, that, by putting 100*l.* they have rated it according to the value that has been paid for the diversion of the water; if so, they were applying a wrong principle. It may be they thought 100*l.* was the right value on the principle I have just mentioned. Our decision is simply asked for on the case as it stands at present; if the assessment was made on a wrong principle, when the next rate is made they will apply, no doubt, the correct principle as now enunciated by the Court.

Rate affirmed.

Attorney for appellants: *Frankish, for Gold Edwards, & Weston, Denbigh.*

Attorneys for respondents: *Tooke & Holland.*

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May 8.

Justices, Jurisdiction of—Crime committed beyond the Seas—"Next court of oyer and terminer"—Misdemeanour by Governor of a Colony—11 & 12 *Wm.* 3, *c.* 12; 42 *Geo.* 3, *c.* 85—11 & 12 *Vict. c.* 42, *ss.* 2, 17, 20, 25.

By 11 & 12 Wm. 3, c. 12, and 42 Geo. 3, c. 85, if any governor of a colony, or other person holding or having held public employment out of Great Britain, has been guilty of any crime or misdemeanour in the exercise of his office, every such crime, &c., may be prosecuted or inquired of, and heard and determined, in the Court of King's Bench in England, either upon information by the Attorney-General, or upon indictment found, and such crime, &c., may be laid to have been committed in Middlesex:—

Held, that an offence under the above statutes was "an offence committed on land beyond the seas, for which an indictment might legally be preferred in any place in England," within 11 & 12 Vict. c. 42, s. 2, and that that section and the other enactments of that statute, as to preliminary examination, &c., before a magistrate in whose jurisdiction the accused might be, applied to charges under the above statutes, and that the Court of Queen's Bench is included in the term "next court of oyer and terminer" in s. 20.

RULE calling on the defendant and James Vaughan, Esq., one of the metropolitan police magistrates, to shew cause why a mandamus should not issue commanding the magistrate to hear the evidence in charges preferred against the defendant on the 22nd of April, and to proceed thereon according to law.

The defendant, John Edward Eyre, having been governor of the island of Jamaica, in 1865, and having returned to England, and being within the jurisdiction of the magistrate, application was made to the magistrate, under 11 & 12 Vict. c. 42, for warrants or summonses, charging the defendant, under 11 & 12 Wm. 3, c. 12, s. 1 (1), and 42 Geo. 3, c. 85, s. 1, with having while governor of

(1) 11 & 12 Wm. 3, c. 12:—"An act to punish governors of plantations in this kingdom for crimes by them committed in the plantations." Section 1 enacts, "That if any governor, lieutenant-governor, deputy-governor, or commander-in-chief of any plantation or colony within his Majesty's dominions beyond the seas, shall after the 1st day of August, 1700, be guilty of oppressing any of his Majesty's subjects beyond the seas, within their respective governments or commands, or shall be guilty of any other crime or offence, contrary to the laws of this realm, or in force within their respective governments or commands, such oppressions, crimes, and offences shall be inquired of, heard, and determined in his Majesty's Court of King's Bench, here in England," &c.

42 Geo. 3, c. 85:—"An act for trying and punishing in Great Britain persons holding public employments, for offences

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Jamaica illegally proclaimed martial law, and for certain other alleged misdemeanours committed as governor of the island. The magistrate granted two summonses accordingly, and the defendant appeared before the magistrate on the 22nd of April; but on the hearing the magistrate declined to proceed, having doubts whether the 11 & 12 Vict. c. 42 (1) extended to the case.

The defendant took no part in the proceedings.

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committed abroad," &c. Section 1, after reciting that persons holding and exercising public employments out of Great Britain often escape punishment for offences committed by them, for want of courts having a sufficient jurisdiction, in or by reason of their departing from the country or place where such offences have been committed, and that such persons cannot be tried in Great Britain for such offences as the law now stands, inasmuch as such offences cannot be laid to have been committed within the body of any county; and whereas it is therefore expedient that such and the like provisions as are contained in the 11 & 12 Wm. 3, c. 12; 13 Geo. 2, c. 63; 24 Geo. 3, c. 25, ought to be extended, it is enacted, that from and after the passing of this act, "if any person who now is, or heretofore has been, or shall hereafter be employed by or in the service of his Majesty, his heirs or successors, in any civil or military station, office, capacity, out of Great Britain, &c., shall have committed, or shall commit, or shall have heretofore been, or is, or shall hereafter be guilty of any crime, misdemeanour, or offence, in the execution, or under colour, or in the exercise of any such station, office, capacity, or employment as aforesaid, every such crime, offence, or misdemeanour may be prosecuted or inquired of and heard and determined in his Majesty's Court of King's Bench, here in England, either upon an information exhibited by his Majesty's Attorney-General, or upon an indictment found, in which information or indictment such crime, offence, or misdemeanour may be laid and charge to have been committed in the county of Middlesex," &c.

(1) 11 & 12 Vict. c. 42, s. 2:—"In all cases of indictable crimes or offences of any kind or nature whatsoever committed on the high seas, or in any creek, harbour, haven, or other place in which the admiralty of England have or claim to have jurisdiction, and in all cases of crimes or offences committed on land beyond the seas for which an indictment may legally be preferred in any place within England or Wales, it shall be lawful for any one or more of her Majesty's justices of the peace for any county, riding, division, liberty, city, borough, or place within England or Wales in which any person charged with having committed or with being suspected to have committed any such crime or offence shall reside or be, or shall be supposed or suspected to reside or be, to issue his or their warrant to apprehend the person so charged, and to cause him to be brought before him or them, or some other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, to answer to the said charges, and to be further dealt with according to law."

By s. 17 the evidence is to be taken in the presence of the accused; and

Powell, Q.C., shewed cause for the magistrate. By the 11 & 12 Wm. 3, c. 12, and 42 Geo. 3, c. 85, which are very similar in their terms, if the governor of a colony, or other person holding public employment abroad, be guilty of an offence in his office, every such offence may be prosecuted or inquired of, and heard and determined, in the Court of Queen's Bench in England by information or indictment, and the offence may be laid to have been committed in Middlesex. As Lord Wensleydale said in *Rex* v. *Ruck* (1), the words "dealt with" apply to justices of the peace, "inquired into" apply to the grand jury, "tried" to the petit jury, and "determined and punished" to the Court. The statute under which it was sought to put the proceedings in motion before the magistrate, is the 11 & 12 Vict. c. 42, which repeals the former statutes, and is simply an act defining and regulating the magistrate's jurisdiction out of sessions with respect to persons charged with indictable offences, but not extending it. Section 2 gives jurisdiction to the magistrate only in the case of an offence triable in any *place* in

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by s. 20, it is made lawful for the justice or justices before whom any such witness shall be examined, "to bind by recognizance the prosecutor and every such witness to appear at the next court of oyer and terminer or gaol delivery, or superior court of a county palatine, or court of general or quarter sessions of the peace, at which the accused is to be tried; . . . and the recognizances, together with the written information, if any, the depositions, the statement of the accused, and the recognizance of bail, if any, in every such case, shall be delivered by the justice or justices to the proper officer of the court in which the trial is to be had."

Section 25:—"When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justice or justices of the peace then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such justice or justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such justice or justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise a strong or probable presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant, commit him to the common gaol or house of correction for the county, riding, division, liberty, city, borough, or place to which by law he may now be committed, or, in the case of an indictable offence committed on the high seas, or on land beyond the sea, to the common gaol of the county, riding, division, liberty, city, borough, or place within which such justice or justices shall have jurisdiction, to be there safely kept until he shall be thence delivered by due course of law, or admit him to bail as hereinbefore mentioned."

(1) 1 Russ. Cr. 827, 3rd ed.

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England. Here the offence is to be tried in the *Court* of Queen's Bench only, the venue, not the place of trial, being Middlesex. The statute had reference to the various statutes which enables a person guilty of a crime committed abroad to be tried in any county in England in which he is apprehended. Section 20 was the section most noticed on moving the rule, and *Lord Sanchar's Case* (1) was relied on as shewing that the Court of Queen's Bench would be included in the general term "next court of oyer and terminer." That case, however, turned on the particular wording of the particular statute. But although the Court of Queen's Bench is a court of oyer and terminer, it being the supreme court of oyer and terminer, yet, for that very reason, it is not to be included in such general words; and when the legislature intends to include the Court of Queen's Bench it does so by specific words; as in 59 Geo. 3, c. 69, s. 4, by which certain offences "may be tried in his Majesty's Court of King's Bench at Westminster, and the venue laid at Westminster, or at the assizes, or the sessions of oyer and terminer, and gaol delivery, or at any quarter or general sessions of the peace." The expression is, the *next* court of oyer and terminer, whereas the Queen's Bench is a permanent court. Again, suppose the magistrate had not been acting in Middlesex, where the Court of Queen's Bench is, but in another county, by s. 25 he would have to commit the accused to the gaol of that county, to be kept till delivered by due course of law; but ex concessis there would be no jurisdiction to try the present defendant in any county but Middlesex.

[BLACKBURN, J. The effect would be that in such a case the defendant would have to be brought up by habeas corpus to be tried in the place where there was jurisdiction to try him.]

Surely the legislature, had they intended the statute 11 & 12 Vict. c. 42 to apply to such a case as the present, would have made provision for the magistrate committing the accused to the proper custody, as well as forwarding the depositions to the proper court.

[BLACKBURN, J. Under the early statutes of Philip and Mary the depositions would have to be forwarded to the next court

(1) 9 Rep. 116.

within the justice's jurisdiction; but the law was altered by 7 Geo. 4, c. 64, and the recognizances and depositions are to be forwarded to the court at which the accused is to be tried.]

That enactment is repealed by 11 & 12 Vict. c. 42, s. 34, and no doubt by s. 20 the depositions and recognizances are to be returned to the court at which the defendant is to be tried, but then the recognizances can only be to the next court of oyer and terminer, and the committal under s. 25 must be to the gaol of the county or place in which the justice is acting.

[LUSH, J. That argument amounts to saying that no magistrate would have jurisdiction to make a preliminary investigation into this peculiar class of offence, but that the indictment must be preferred ex parte. But s. 2 obviously intends that there should be jurisdiction to inquire into all offences committed abroad which can be tried in England.]

The act was not intended to give new jurisdiction, but simply to say how the justices should proceed.

[BLACKBURN, J. Is that so clear? The statute of 7 Geo. 4 was certainly an extending statute. The preliminary proceedings are for the advantage of the accused.]

No doubt: and although that affords an argument in favour of a wide construction, still a magistrate ought not to assume jurisdiction unless it is clear, and in this case the magistrate only wishes for the sanction of the Court before he acts.

Sir R. P. Collier, Q.C., Fitzjames Stephen, Q.C., and *Horne Payne*, in support of the rule, were not heard.

BLACKBURN, J. I think it is clear that this rule must be made absolute to the extent that is asked, viz., that the magistrate be directed to proceed with and investigate this case, and if upon hearing the evidence and taking the depositions, he thinks it is not a proper case, or that the charges are not made out, then of course he will not commit. He is to inquire and decide judicially upon the evidence that he hears. But if he does commit, then he is to take the depositions and return them to the Court of Queen's Bench, where, and where alone, this charge can be tried, before the then next sitting of the Court of Queen's Bench, at which the grand jury will be summoned here.

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The question depends entirely upon what is the jurisdiction of the justice, and what he is required to do. The commission which a justice had, when it was originally instituted, was limited to a particular district, and he could act only with respect to crimes within that district. That has been extended. I do not remember precisely the first and earliest enactment that enabled a justice to commit where a prisoner was found in his jurisdiction, but it was very early that the question as to depositions came up. The statutes of 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, required that justices shall take the depositions and take bail for the prisoner; the second statute extended it to cases of felony, whether the accused were bailed or committed.

A magistrate was to take in writing the depositions which were made before him, and return them to the first court of oyer and terminer that came to the district where the magistrate was acting. The effect of that would be, as far as the ordinary acts of a magistrate, to enable the Court to see whether the magistrate had acted rightly or wrongly in the matter, because before, the magistrates had not to return any depositions which are now produced for the purpose of showing what the preliminary charge was, to assist at the trial both the accused and the Court. Then came the statute of 7 Geo. 4, c. 64, amending the law of England, and amongst other things, in s. 2, applying to felonies, after reciting that it was expedient to amend and extend the provisions of the two other statutes that I have mentioned, enacted as follows:—[The learned judge read the section.] This enactment is in general terms, and is extended by s. 3 to misdemeanours. The 11 & 12 Vict. c. 42, for the purpose of regulating the proceedings of justices out of sessions, re-enacts it, using wider words, so as to make the application still more extensive. By s. 2 it is enacted, that in all cases of crimes or offences committed on land beyond the seas, for which an indictment may be preferred in any place in England and Wales, it shall be lawful for justices to cause the person charged to be apprehended when within their jurisdiction. Now the contention in the present case is, first, that the offences, created by these two particular acts of parliament, which are in effect one, viz., misdemeanours committed in the office of governor and other places of authority, can only be tried in the Court of Queen's Bench in

Middlesex; and that the offences were not a crime of any kind committed on land beyond the seas for which an indictment may be legally preferred in any place within England and Wales. I must own that I listened to find out what reason could be given, and I could not find any. By express enactment passed previous to this act, and other acts, any indictment might be tried in the Court of Queen's Bench. Why this class of offence was not to be considered an offence of any kind committed on land beyond the seas for which an indictment might be legally preferred in any place in England or Wales, I certainly was unable to conceive. It clearly was a crime that might be tried in England. Then the section goes on to say that the offender shall be brought before the magistrate to be dealt with according to law; and there is a section (s. 20) which applies to binding over the prosecutor and witnesses "to appear at the next court of oyer and terminer, or gaol delivery, or superior court of county palatine, or court of general or quarter sessions of the peace at which the accused is to be tried." And on this it was argued that although the Court of Queen's Bench was a court of oyer and terminer, and in the particular matter of trying a criminal sits peculiarly as a court of oyer and terminer, and though if the charge is to be preferred at all against Mr. Eyre, or against a governor, or other person having an authority in a colony, for committing a crime in the course of his office, it is to be tried in the Court of Queen's Bench, and in the Court of Queen's Bench sitting as a court of oyer and terminer, yet for some reason or other, we are to suppose, when the statute said the magistrate was to bind over the witnesses to appear at the next court of oyer and terminer, where the accused was to be tried, that did not apply to the Court of Queen's Bench when the accused was to be tried there; and the reason why, as far as I could make out, was not that it was to be denied that the Court of Queen's Bench was a court of oyer and terminer, but that these general words were not to be considered as extending to the Court of Queen's Bench; on something like the rule that the Queen's prerogative was not bound by a statute unless expressly named in it, I suppose the Court of Queen's Bench was to be considered of such high position that unless it was specifically named it was not to be included in the general term, "a court of oyer and terminer." No such rule has ever existed that I am aware

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of. *Lord Sanchar's Case* (1) is, as I apprehend, an authority to the contrary; and when you look at the authority it applies as much to the present case as any other. The previous application to a magistrate is not necessary except in cases provided for by 22 & 23 Vict. c. 17; but it has always been considered oppressive to prefer an indictment ex parte, and a course that has been very much found fault with, and is a very mischievous and bad course, consequently the legislature has in general enabled a preliminary examination to take place. I think it would have been well if they had made a positive enactment in every case; but they have, as a general rule, enabled the parties to go before a magistrate, and then the depositions are to be taken and returned; and when the legislature first enabled this to be done by 7 Geo. 4, c. 64, and 11 & 12 Vict. c. 42, in general terms applying it to all crimes tried before all courts, certainly the Court of Queen's Bench quite as much as to any other, it seems to me that the magistrate, if a proper case is made before him, has power to take recognizances, and bind over to prosecute in this Court. It would be very inconvenient if an indictment were found behind the back of the accused, without any one knowing what it was. It is very much better that a magistrate should hear the matter, and for the reasons already given, I think when the prosecutor goes before a magistrate he is bound to hear and entertain the case. I may add that there can be no doubt that, as this was the first case of the kind, the magistrate, not seeing his way clearly as to whether he had jurisdiction, was perfectly right to obtain the sanction of this Court before acting.

MELLOR, J. I am of the same opinion. It appears to me when you look at the statutes upon the language of which Mr. Powell's argument is mainly based, namely, the statutes which give the power to the Court of Queen's Bench to hear and determine charges of this description against persons who have exercised any public situation, capacity, or employment in the colonies, that his argument falls to the ground. The language is this, that the charge is to be prosecuted, "or inquired of, and heard and determined in his Majesty's Court of King's Bench here in England,

(1) 9 Rep. 116.

either upon an information exhibited by his Majesty's Attorney-General or upon an indictment found, in which information or indictment, such crime, offence, or misdemeanour may be laid and charged to have been committed in the county of Middlesex." As I understand, Mr. Eyre was charged before the magistrate with an indictable offence within this statute. Then, it is said that although he may be tried in the Court of Queen's Bench, sitting as a court of oyer and terminer, no doubt, still he is not to have the advantage which the various statutes provide for the benefit of accused persons that the case should be previously investigated before a magistrate; particularly 11 & 12 Vict. c. 42, in which it is enacted:—[The learned judge read s. 2.] Mr. Powell's contention is that, preferring an indictment before the grand jury summoned for the purpose of inquiring into all offences committed within the jurisdiction of this court, is not within the meaning of the word "place." It is a crime that is to be inquired of and prosecuted in this Court by indictment. It is an indictable offence. I confess I feel very great difficulty in saying what there is to support his construction; the section applies to all indictable offences, and therefore applies to the offence with which Mr. Eyre is charged. Without going into what the proceedings may be before the justices with reference to recognizances and so on, it is enough for me to say that there is no reason that I can find in that rule of construction which requires us to hold that Mr. Eyre should be deprived of what is a benefit to him, simply because the crime he is charged with is to be prosecuted and inquired of in the Court of Queen's Bench. It seems to me reasonable as well as just, to say that the magistrate must hear this case, and he must exercise his own discretion as to whether the case is made out by the evidence, so as to entitle him to treat it as an indictable misdemeanour.

LUSH, J. The only question before us is whether the magistrate has jurisdiction to entertain this charge, the magistrate having jurisdiction in the county where the defendant is found to be, the charge being one based upon 11 & 12 Wm. 3, c. 12, which by the terms of that act can only be tried and determined in this Court. The magistrate entertained a doubt whether he had jurisdiction.

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I think, entertaining that doubt, he very properly referred the matter to this Court for us to determine whether he had that jurisdiction or not. Now, upon consideration of 11 & 12 Vict. c. 42, I come to the conclusion without any doubt whatever, that the magistrate has jurisdiction to deal with this as with any other offence committed within his jurisdiction; and I must say as the statute provides for the protection of persons accused, by enabling them to be brought before magistrates and have a preliminary investigation, it would be extraordinary to my mind if this particular case were excluded from it. When I look at s. 2 of 11 & 12 Vict. c. 42, which is only a consolidation of the various acts which were in existence before, I cannot come to any other conclusion than that the legislature intended to embrace every description of indictable offence. If the words are clear, the meaning of the act being clear, we are bound to give it that meaning. I think the words are amply sufficient. I fancy I see portions of this act of parliament which expressly refer to cases like this committed abroad. The 2nd section is as wide as it could well be, and is in these terms:—[The learned Judge read the section.] This is a charge of crime committed on land beyond the seas, for which an indictment may legally be preferred in a place in England, that is to say, in the Court of Queen's Bench. It is therefore precisely within the preliminary portion of the act. There are sections providing as to the magistrate issuing a summons instead of a warrant, and then s. 25 declares what is to be done after the examination:—[The learned Judge read the section.] The magistrate is either to bail the accused, or if he thinks it is not a case for bail, to commit him to the common gaol or house of correction for the county to which by law he may then be committed. Or in the case of an indictable offence committed on the high seas, or on land beyond the seas, to the common gaol of the county, riding, division, liberty, city, borough, or place within which such justice or justices shall have jurisdiction, to be there safely kept until he shall be then delivered by due course of law. Section 20 also embraces that which the 7 & 8 Geo. 4, c. 64, and the Acts of Philip and Mary had done before. That is the magistrate is to send the depositions, the statement of the accused, and the recognizances of the bail which he is to take for the accused, to the

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proper officer of the court in which the trial is to be had. The statute provides therefore for enabling the magistrate to carry out the transaction, either by bailing the accused party, or by acquitting him, or by committing him to take his trial. I do not see the least difficulty in carrying out the act. The words I have mentioned in s. 2 are large enough to embrace, and it appears to me were intended to embrace, every description of offence, this among the rest. I am therefore of opinion that the magistrate has jurisdiction to entertain this charge, in the same way as any other brought before him.

Rule absolute.

Attorneys for prosecution: *Shaen & Roscoe.*
Attorneys for magistrate: *Hopwood & Sons.*

[IN THE EXCHEQUER CHAMBER.]

May 9.

BRYANT *v.* FOOT, CLERK.

Immemorial Custom—Prescription—Marriage Fee—Rankness.

From the year 1808 to 1854 the fee paid on the celebration of a marriage in a parish church was proved to have been almost uniformly 13*s.*, viz., 10*s.* to the rector and 3*s.* to the clerk. There was no evidence extending beyond 1808. The Court having power to draw inferences of fact:—

Held, by Kelly, C.B., Martin and Channell, BB., that, considering the difference in the value of money in 1189 and the present time, of which the Court will take judicial notice, it was impossible that a payment of 13*s.* on every marriage could have been made at that period, and that the objection of rankness applied, and rebutted the presumption, arising from uninterrupted modern usage, that the fee was taken as of right in the time of Richard I.

Semble, also, by the same judges, that a marriage fee must be a fixed fee, and cannot be of a varying amount; but that, if it were otherwise, the evidence would not support the claim to a merely reasonable or varying fee; and, *quære*, whether the sum of 13*s.* on every marriage in a small country parish is a reasonable fee at the present day.

By Bramwell, B., and Byles, J. That the fee was not a reasonable fee at the present time; that it could not have been due as of right in the time of Richard I., and could have no immemorial legal existence.

By Keating, J. That, as the fee claimed had been paid as far back as living memory went, and as a legal origin could be assigned to the payment, the presumption from this long-continued payment was, that it had an immemorial legal existence: unless rebutted by proof to the contrary, and that the large amount of the fee was not sufficient to rebut the presumption.

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ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiff, on a special case. (1)

The defendant was the rector of the parish of Horton, and claimed a marriage fee from the plaintiff. As far back as the year 1808, and from that year down to the year 1854, the fee paid on the marriage of a man and woman in the parish church of Horton was either 13*s.* 6*d.*, or 13*s.* But the fee most frequently paid on such marriages during the above period was 13*s.*, that is 10*s.* for the rector, and 3*s.* for the clerk. There was not any evidence as to what fees had been paid on marriages in the church prior to 1808.

The question was, whether the above was the legal fee or accustomed duty payable on the celebration of a marriage in the said church, or whether there was any and what legal or accustomed fee; the Court having liberty to draw all inferences of fact.

The Court below differed in opinion: Cockburn, C.J., Mellor, and Lush, JJ., held that the amount of the fee, being so great as to lead to the irresistible inference that it could not have existed, in point of fact, in the time of Richard I., was sufficient in itself to rebut the presumption, arising from modern enjoyment, that the fee had an immemorial legal existence; Blackburn, J., held that the doctrine of rankness is confined to moduses; and that the large amount of a customary payment, shewn to have been in fact taken as of right as long as living memory or evidence goes, is not enough to rebut the presumption that the usage had a legal origin.

Judgment was entered for the plaintiff in accordance with the opinion of the majority of the Court. (2)

Nov. 26, 1867. *Coleridge, Q.C.* (*Prideaux, Q.C.*, with him), for the defendant. The offices of rector and clerk are ancient offices with ancient duties, to which customary fees are attached; and for which an action lies, if the fee be immemorial in its character and reasonable in its amount. These fees cannot be recovered as of common right, but must be claimed by prescription. As to the right of the parson to take fees of some kind, the authorities are

(1) Law Rep. 2 Q. B. 161.

(2) See Law Rep. 2 Q. B. 161, where the case is set out at length.

clear. In Degge's Parsons' Counsellor, p. 421, it is stated: "So that upon the whole matter it appears there were some offerings free and voluntary, which the parishioners or others were not bound to perform, but ad libitum. There were others, by custom, certain and obligatory; as those for marriages, christenings, churching of women, burials, &c., and that these were all due and belonged to the parish priest or minister that officiated at the mother church or chapel that had parochial rights." Then he cites the 2 Edw. 6, and continues: "These offerings which were free and voluntary are now vanished .... but those that are customary and certain, as for communicants, marriages, christenings, churching of women, and burials, are confirmed to the parish priest, vicar, and curates of the parishes where the parties live that ought to pay the same." Watson's Clergyman's Law, p. 1033, is to the same effect. In *Fuller* v. *Say* (1) the question arose whether a custom to pay 4*d.* as an Easter offering was good, and in a note to the case, the opinion of the judges is given, holding it to be a good custom. In principle there can be no difference between an Easter offering and a marriage fee. In *Patten* v. *Castleman* (2), it was held that a claim by a minister for a marriage fee on the wedding of a parishioner in another parish, was bad, on the ground that where no service is done no fee can be claimed. All the authorities on the subject are there collected, and from Sir G. Lee's judgment it would appear that the claim would have been good if the marriage had taken place in the defendant's parish. The cases cited in the judgment establish that a marriage fee, if it be reasonable and immemorial, may be recovered by the incumbent, on the ground that it is a compensation for work done. It is also clear that the parish clerk is entitled to a fee. There is no distinction in this respect between the incumbent and the parish clerk: Burn's Ecclesiastical Law, vol. iii. Tit: Parish Clerk, p. 84; Ayliffe's Parergon, p. 409. These two persons being entitled to a fee, that a customary fee is due is established by the rubric in the Book of Common Prayer, and that book is part of the Act of Uniformity. In the rubric to the first Prayer Book of Edward VI. the fee is called "tokens of spousage," and in the second prayer book of the same reign the

(1) Willes, 629. (2) 1 Lee's Eccles. Cases, 387.

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expression is changed to "the accustomed duty to the priest and clerk;" if a payment of a sum of money at that time was a customary fee, it is one now. *Fleetwood* v. *Finch* (1) is an authority for saying that an ancient fee may attach on a modern act of parliament, and that if work be done it is only reasonable that the officer should have a compensation for his labour; if the fee is to be paid for work done, and to be paid for in money, the amount must vary with the value of money; if this were not so, it would extinguish every fee in the kingdom. A payment in the same number of coins which would be reasonable in one age would not be reasonable in another. If a reasonable compensation is to be recovered for work done, it must vary, or else it would cease to be reasonable. In *Shephard* v. *Payne* (2) a fee of 7*s.* 6*d.* was held not to be unreasonable as a visitation fee paid to the registrar of the court of an archdeacon. In that case there was evidence that another amount had been taken in former times, and the Court held that "a fee need not be of a fixed and ascertained, but may be of a reasonable, amount." From the fact that the right to the fee has been claimed and enjoyed since 1808, a jury would be told to presume that it has existed from time immemorial; in the same way that a jury would be directed to presume from sufficient evidence of enjoyment, a modern grant which has been lost; such presumption did not always proceed on a belief that the thing presumed had actually taken place. In 3 Starkie on Evidence, p. 911, it is stated, "Such evidence in theory is mere presumptive evidence; in practice and effect it is a bar." In *Shephard* v. *Payne* (3) the correct mode of leaving such a question to the jury is stated to be, to tell them that from uninterrupted modern usage they should find the immemorial existence of the payment (if that be necessary for its validity) unless some evidence is given to the contrary; and a similar mode of leaving the question to the jury is laid down by Parke, B., in *Jenkins* v. *Harvey* (4), and cited with approval in *Shephard* v. *Payne*. (5) That a fee need not be of a fixed and ascertained, but may be of a reason-

(1) 2 H. Bl. 221.
(2) 12 C. B. (N.S.) 414, 433; 31 L. J. (C.P.) 297, 304.
(3) 16 C. B. (N.S.) at p. 135; 33 L. J. (C.P.) at p. 161.
(4) 2 C. M. & R. 393.
(5) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158.

able, amount, was laid down in *Mills* v. *Mayor of Colchester* (1), where the Court of Common Pleas dissent from the judgment of the majority of the Court of Queen's Bench in the present case. In the judgment of that case, the earlier authorities are collected; and the argument, founded upon a supposed difficulty in sustaining a custom for a reasonable payment, not being a fixed and arbitrary sum, but capable of varying in nominal amount with the value of money from time to time, is controverted. In *Coryton* v. *Lethebye* (2), it is stated that in a declaration for not grinding corn at an ancient mill, it is sufficient to declare generally, without alleging that the toll is a reasonable toll; and in *Gard* v. *Callard* (3), it was laid down that long usage and acquiescence in one uniform payment was cogent evidence that it was reasonable. In *Trotter* v. *Harris* (4), it was held that from a user of thirty-five years, the jury may presume that a ferry had a legal origin, and a variation in the amount of ferriage will not avoid the franchise. In *Laybourn* v. *Crisp* (5), 8*s.* for every score of the first hundred bushels, and 4*s.* for every score of bushels of the remainder of the cargo, was held to be a reasonable compensation to the deputy day meter of the City of London, who claimed by immemorial custom an exclusive right to unload all oysters brought in any boat for sale to any place within the port of London. Five shillings are now paid at the registrar's office for a marriage by civil contract; 14*s.* or 15*s.* are often paid as a burial fee, and the present fee of 13*s.* is not now unreasonable. It is also objected that the fee is bad for rankness. The only authority that can be found for saying that the rule as to rankness is not confined to the case of a modus, is *Traherne* v. *Gardner* (6); but on principle, the rule of rankness can only apply to a modus; a modus is a composition fixed once for all, a payment which in its nature is invariable and ascertained. If there is no fixity of payment there is no modus. The question in that case is, was it a fixed payment from the time of legal memory? There can be no agreement for the payment of a reasonable sum in lieu of tithes;

(1) Law Rep. 2 C. P. 476.
(2) 2 Wms'. Saund. 113a, note (1).
(3) 6 M. & S. 69.
(4) 2 Y. & J. 285.
(5) 4 M. & W. 320.
(6) 5 E. & B. at p. 940; 25 L. J. (Q.B.) at p. 205.

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but here the sum need not be a fixed sum, it is sufficient if it be reasonable, the rule as to rankness, therefore, does not apply on the facts of this case. The presumption is, that a marriage fee has been paid from time immemorial, and in the absence of evidence to the contrary, the Court ought to find that the fee now claimed is reasonable.

Nov. 26 & 27. *Mellish, Q.C.* (*Macnamara* with him). The question is, whether upon the evidence the Court acting as a jury ought to infer, that the two fees of 10*s.* to the rector and 3*s.* to the clerk—taking them to be fixed fees—have been received in the parish of Horton from time immemorial. Originally a marriage fee was a gratuity given to the priest, but in course of time it became a fixed payment payable as of right. If that is its origin, how could there have been a custom to pay a reasonable amount; it is a mistake to say that it is paid to the priest for work and labour done; a parson is bound to marry persons by virtue of his office. If there is no custom in the parish to pay a fee, he is bound to perform the marriage ceremony without a fee; if there is a custom, the priest receives from the parishioner the customary fee which is a fixed payment. This appears to be clear from the mode in which the fee was enforced; it can be recovered in the Ecclesiastical Court only by virtue of a custom, and if the custom were disputed a prohibition would be granted, the spiritual court not being competent to try a custom, as they used to establish one after a user of forty years, whereas the common law requires it to have been from time of legal memory: *Spry* v. *Gallop.* (1) If the custom were to pay a reasonable fee, it would be for the temporal court to find the custom, and for the ecclesiastical court to decide what amount would make a reasonable fee: the consequence would be that every beneficed clergyman who thought his fees were too low would be able to raise them, subject to the opinion of the Ecclesiastical Court; but no one ever heard of that court fixing the amount of a marriage fee. Again, if the custom before legal memory was to pay a reasonable fee, which was variable and could be altered from time to time, what is there to prevent the fee being raised at the present day? There is no authority for saying that a

(1) 16 M. & W. at p. 732.

marriage fee has ever been raised. *Spry* v. *Marylebone* (1), shews that burial fees cannot be recovered unless they are ancient customary fees, as in that case they were alleged to have been paid out of the poor-rates, and that disproved their ancient origin. The earliest authority on the subject is the constitution of Archbishop Langton in 1222, which is given in English in 2 Burn's Ecclesiastical Law, p. 480: "We do firmly enjoin that no sacrament of the church shall be denied to any one upon the account of any sum of money, nor shall matrimony be hindered therefore; because, if anything hath been accustomed [consuetum fuerit] to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterwards." And Lyndwood, in his Provinciale, lib. v. tit. 2, at p. 279, commenting on the words "consuetum fuerit," says: "Scilicet ab antiquo et per tempus præscriptibile, licet ex voluntariâ præstatione. Nam ex quo tanto tempore solverunt, præsumuntur prius se ad id voluntarie obligasse." This is inconsistent with a custom to pay a reasonable sum. That which was voluntarily given became a fixed customary fee, and was enforced by the ordinary. In the rubric to the first prayer-book of Edward VI., no mention is made of a marriage-fee. The words are, "the man shall give unto the woman a ring and other tokens of spousage, as gold or silver;" and if the whole rubric is read and compared with the marriage service, it will be at once seen it has no reference to the marriage fee. In the rubric in the second prayer book the words are "accustomed duty," which is substantially the same as the words in the present prayer book. The "accustomed duty" means not a varying fee, but a fixed payment which has been always paid. The fee is not fixed by the Act of Uniformity. How can it be raised to 13*s.* now? This sum is so large that it is impossible to believe that it was not a large sum in the time of Edward VI., as it certainly must have been in the time of Richard I. *Fuller* v. *Say* (2), and *Patten* v. *Castleman* (3), shew that the fee was of a fixed amount, payable by custom. The judgment of the court below has been dissented from in *Mills* v. *Mayor of Colchester* (4); but the authorities cited in that judgment do not support the proposition there laid down. There is a

(1) 2 Curteis, 5.
(2) Wilkes, 629.
(3) 1 Lee's Eccles. Cases, 387.
(4) Law Rep. 2 C. P. 484.

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vast distinction between the case of a toll and a marriage fee. A toll may be created since the time of legal memory, and on the grant of a market a toll of reasonable amount may be reserved, and a reasonable toll may vary from time to time. But a marriage fee is of a fixed amount. No case has decided that where a toll has once been fixed it can be varied from time to time. Certainly the cases cited in *Mills v. Mayor of Colchester* (1), do not decide that question, nor do they relate to marriage fees or ecclesiastical fees. Fees paid to officers of courts stand on a different footing; such fees are not claimed by immemorial custom. Whether the offices they hold are ancient or modern, they are entitled to a fee for work done on a quantum meruit which may be of a varying amount, but a payment in gross for services rendered cannot vary. Assuming, then, that a marriage fee is of a fixed amount, what direction ought the Court to have given a jury? The evidence is, that from 1808 a marriage fee of 10*s.* to the rector and 3*s.* to the clerk has been paid. Ought the judge to direct the jury that, as a matter of law they are to presume that a fixed fee of that amount has been paid from the time of Richard I. The sum even in modern times is enormous, and from so large a sum having been paid in modern times, are the jury to be told to presume it was paid in the time of Richard I., when it is quite clear it could not? If it is a presumption of fact capable of being rebutted, does not the largeness of the fee remove the presumption; and what jury could find that this fee was the accustomed fee paid in the time of Richard I.? It was only in the case of lost grants that the jury were told to find contrary to the fact. The doctrine of rankness in a modus is a mere rule of evidence drawn from the impossibility of the fact, and not a rule of law: Eagle on Tithes, vol. ii., 185. If so, there is no reason why that rule should not be applied to cases other than tithes. It was applied to the case of a toll for measuring coals in *Traherne* v. *Gardner* (2); the point was raised in *Jenkins* v. *Harvey* (3), but the rule did not apply to that case, because the toll was due for the use of the port as well as for measuring coal, and the port due might have been created since the time of legal memory. *Gann* v. *Whitstable Free*

(1) Law Rep. 2 C. P. at p. 485.

(2) 5 E. & B. at p. 940; 25 L. J. (Q.B.) at p. 205. (3) 2 C. M. & R. 393.

2 Jur. N.S. 394

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Fishers (1), is an authority for saying that evidence of a fixed payment in modern times is not, of itself, sufficient to support an immemorial claim. The largeness of the fee is sufficient of itself to shew that it could not have existed in the time of Richard I. The Statute of Labourers, 25 Edw. 3, st. 2, cc. 1—3, A.D. 1350, fixed the wages of a master carpenter at 3*d.* and his man at 1*d.*; this shews that such a fee could not have existed at that time, à fortiori not at the time of Richard I.; and looking at the relative value of money, it is an exorbitant fee at the present time. Any fee which is so large as to render marriage practically impossible is an unreasonable fee.

Coleridge, Q.C., in reply.

Cur. adv. vult.

May 9. The following judgments were delivered:—

The judgment of Kelly, C.B., Martin and Channell, BB., by

KELLY, C.B. This is an appeal from the judgment of the Court of Queen's Bench. The defendant, the rector of Horton, in the county of Bucks, claims by prescription the fee of 10*s.* as payable to the rector, and 3*s.* to the clerk, upon every marriage celebrated in the parish; and the question is, whether this claim can be maintained. The evidence is, that from 1808 until 1854 these fees of 10*s.* and 3*s.* have been received and paid (with some slight variations, but which may be dismissed from the case as immaterial) upon all marriages solemnized in the parish; and the question is, whether the Court (who have the powers of a jury in dealing with the facts) should hold upon this evidence that the claim by prescription to these fees is maintained.

The majority of the judges of the Queen's Bench have determined that it is not, and we are of opinion that this judgment should be affirmed. The true principle of the law applicable to this question is, that where a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory, that is, from the reign of Richard I. to the present time, unless the contrary is proved. In this case, the right to these fees may have had a legal origin before the time of

(1) 11 H. L. C. 192; 35 L. J. (C.P.) 29.

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memory; and the evidence that they have been taken in modern times, during a period of nearly fifty years, leads to the presumption that they were lawfully taken in the time of Richard I., unless the payment at that time be disproved. But we are of opinion that, considering the difference in the value of money in 1189 and the present time, of which the Court will take judicial notice, it is impossible that a payment of such an amount upon every marriage in this parish can have been made at that period; that the objection of rankness therefore applies; that the claim is negatived; and that the plaintiff, who seeks to recover back this fee which he has paid, is entitled to the judgment which he has obtained.

From the importance of the question, however, and the difficulties with which it is surrounded from the peculiar and anomalous state of the law, and from the high respect due to the judicial opinion delivered by Blackburn, J., who dissented from the judgment of the majority of the Court of Queen's Bench, it becomes necessary that we should carefully consider and observe upon the objections to the judgment adverted to by Blackburn, J., and which have been urged with great ability at the bar, upon the argument before this Court.

It must be admitted on the part of the plaintiff that the receipt of this fee for nearly fifty years is evidence that the payment is immemorial if it can have had a legal origin, and the contrary be not proved. Here, a legal origin may also be presumed. The payment of these fees was originally voluntary; but where they have been paid before the time of legal memory, the title to them as a customary payment is established. But the payment must be immemorial, that is, they must have been paid in the time of Richard I.; and it is clear, upon all the authorities, that they can be deemed immemorial only if the payment at that period be not disproved. In *Jenkins* v. *Harvey* (1), the language of Parke, B., is this: "From uninterrupted modern usage a jury should find the immemorial existence of the payment, unless some evidence is given to the contrary." And the same case, when a second time before the Court, (2), is to the same effect. In *Shephard* v. *Payne* (3), Blackburn, J., in delivering the judgment of the Court

(1) 1 C. M. & R. 877, 894.
(2) 2 C. M. & R. 393.
(3) 16 C. B. (N.S.) 132, 135; 33 L. J. (C.P.) 158, 160.

of Exchequer Chamber, observes: "Where there has been long continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed unless the contrary be proved." This qualification "that the contrary be not proved," pervades the authorities, and, we think, necessarily applies to every case of a fixed money payment claimed as immemorial, and which must have existed before the time of memory. And looking to the difference in the value of money, we hold it to be impossible that such a sum as 13s. should have been payable as of right upon every marriage in a small rural parish in England in the time of Richard I.

But it is contended on the part of the defendant that this test of the value of money applies only to cases of modus. We find, however, no authority whatever for this proposition. In reason and upon principle it is impossible to distinguish between the payment of a fixed sum upon a composition for tithes, and as a fee upon the solemnization of a marriage, or upon any other consideration or occasion of the like nature. And Lord Campbell appears to have taken this for granted when he applied this test to the fee payable upon admission to a copyhold in the case of *Traherne* v *Gardiner*. (1) Here then the fact, not indeed expressly proved in evidence, but of which, as observed, the Court will take judicial notice, that the difference in the value of money is so great as to render it certain that this payment cannot have been made in the time of Richard I. is proof, and as we think, proof conclusive to rebut the presumption, arising from the modern usage during fifty years, of an immemorial payment. *Jenkins* v. *Harvey* (2), is cited as an authority for the defendant upon this point; but the Court held, and we think rightly held, upon the evidence in that case, that 4*d.* per chaldron for the metage of coal, and which included, or may have included, the use of a port, might well have been received in the time of Richard I., and was therefore not open to the objection of rankness. Besides, it was possible in that case that the port might have been granted with the metage of 4*d.* as a port due, within the time of legal memory, and so that the sum was recoverable, although not immemorially taken.

(1) 5 E. & B. 918, 940; 25 L. J. (Q.B.) at p. 205.
(2) 1 C. M. & R. 877.

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Shephard v. *Payne* (1) is also relied upon by the defendant; but there, the fee claimed by the registrar of the archdeacon for services performed upon a visitation, was not a fixed sum, but a reasonable sum, varying from time to time, though taken immemorially in respect of those services. And we must distinguish between a fixed fee and a reasonable fee. Either may be claimed by prescription; and if a reasonable fee be prescribed for, the amount may vary; indeed, to be reasonable, it should seem that it must vary; for that which is reasonable now, can scarcely be said to have been reasonable in the 12th century.

Upon a careful consideration, therefore, of the whole of the authorities bearing upon this case, we are unable to find any one instance of the right to a fixed payment being sustained as immemorial, where the amount was so large as to render it impossible or incredible, that it should have been payable as of right, in the reign of Richard I.

The numerous decisions cited as authorities to the contrary, will be found to be cases either of a lost grant, or charter, or conveyance, which may have been made within the time of memory, or of a claim, as in *Shephard* v. *Payne* (1), of a reasonable sum varying in amount according to the value of money, or other circumstances.

If we assume, as insisted by Mr. Coleridge, that in all, or the greater number of these cases, neither judges nor juries have in reality believed that a grant, or a charter, or a conveyance had ever in fact been made, or in another class of presumptions, that customs found to be immemorial had actually existed in the time of Richard I., still, if this state of the law, created by the judges to quiet titles, to protect rights derived from long user or enjoyment, and so, to supply the want of a just and enlightened legislation, be established by these decisions, we must accept it as we find it, and hold that long user or enjoyment, where a legal beginning is possible, shall be equivalent to a legal right, and that the belief or disbelief in the actual existence of the origin presumed, is not an element in the question. But the law thus explained and defined, is perfectly consistent with the proposition contended for by the plaintiff here, that where to establish the

(1) 12 C. B. (N.S.) 414; 31 L. J. (C.P.) 297.

right claimed, a state of things must actually have existed in the time of Richard I. which the court or jury are satisfied cannot by any possibility have existed at that time, no length of user or enjoyment will support the claim. Where a lost grant, or charter, or conveyance is presumed in support of a claim to ancient lights, or any other easement, or to give effect to the possession or enjoyment of land for twenty years or more, or to the long receipt of a port due, or of a fee, or any other payment, and which instrument or payment may have been made, or originated within the time of memory, it is at least possible that it may have actually existed; and the law, while it gives effect to claims resting merely upon long possession or user, is at least free from the absurdity of presuming an impossibility. But where, as in the case of a modus or marriage fee, the law is that the payment claimed must have begun before the time of legal memory, and the amount is so large that it cannot possibly have been made at so early a period, to presume that it was made, would be to fly in the face of the law, and presume an impossibility.

We have thought it right to deliver our opinion upon the important question raised and alone determined in the Court of Queen's Bench; but if it were necessary to consider the other points presented to us in the argument at the bar, we should be prepared to hold that a marriage fee must be a fixed fee, and cannot be of a varying amount; and that, were it otherwise, the evidence in this particular case would not support the claim to a merely reasonable or varying fee; and further, we should pause before we could determine that the sum of 13*s.* is a reasonable fee to be demanded and enforced upon every marriage in a small country parish even at the present day.

We think, therefore, that the judgment of the Queen's Bench should be affirmed; and in this the whole of the judges who heard the argument, with the exception of my Brother Keating, concur; but my Brothers Bramwell and Byles will give their own reasons.

BRAMWELL, B. Without at all dissenting from the judgment of the Lord Chief Baron, I wish to give my own reasons for affirming the judgment; and my Brother Byles desires me to say he agrees with my conclusions, and substantially with my reasons.

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In this case the question is whether 13*s.* is a legal fee or accustomed duty payable on the celebration of a marriage in the parish of Horton, and, if not, whether there is any and what fee. The latter part of the question may be disregarded, it not being suggested that any fee can be demanded as of right, if the fee of 13*s.* cannot. We are to perform the duties of judge and jury. In the former capacity it is agreed that we are to say that no fee is due as of common right, but that it may be due if immemorially paid, that is to say, from the time of Richard I., and if a reasonable fee. This is the law we are to pronounce, and to entitle the defendant to a verdict, those are the facts we are to find. That being so, I say unhesitatingly that I cannot find this is a reasonable fee now. It is a week's wages from an agricultural labourer, and it is not reasonable that such a sum should be demanded as of right from such a person for a duty which properly should be performed gratuitously. If this is a reasonable amount, it is unreasonably low for the adjoining parishes. Further, I don't believe it has been demanded *as of right*, and paid at any time. It may have been asked for and insisted on in certain cases, but I feel convinced that in many it has not. Evidence was given of thirty marriages from 1808 to 1854, but it is not said there were no other marriages in that period. The conclusion I draw is, that the case is the common case of persons holding an office, assumed by those who deal with them to know the rights of the office, always ready to encroach, turn a gratuity into a duty, and whenever the customary gratuity was raised in any particular instance by the liberality or piety of the party, ready to treat that as the due in the next case and obtain it by mixture of request, demand, and appeal to the then payer that he would not be less liberal than the last. It must not be supposed I apply this remark to the defendant, or any in particular of his predecessors. I have no doubt the fee has not been pressed whenever it could not well be paid, and that it is only demanded as of right now to determine a question of right. Besides the person who receives the fee is, I believe, the clerk, who probably would have no knowledge whether anything was due in point of law or not, but would have a strong interest in claiming that there was. But supposing I get over

this difficulty, and that the fee was of such an amount that it might well be paid now, the question would still remain whether I could find as a juryman that it was due as of right in the reign of Richard I. Now, I am perfectly satisfied it was not. I adopt my Brother Mellor's language: "Common sense revolts at the idea; I cannot merely say that I am not satisfied it existed, but I am compelled to say that I am satisfied that it did not and could not have existed." (1) Nobody believes it did; nor in the reign of Edward III., when we bear in mind the prices of articles mentioned in the statutes of that reign. The question is, then, whether, under these circumstances, we are called upon to do violence to our consciences by finding that this custom dated back to the time of legal memory, when we are convinced that such cannot be the case? Why am I to find the contrary of what I am satisfied is the truth? I would, if the law ordered me, leaving the responsibility to the law. If an act of parliament said in certain cases a jury should find black to be white, though one would regret such trifling with an oath and the administration of justice, the jury ought so to find. But that is not the law; I am not told I am bound, but advised, so to find. Then I regret the advice. It seems to me no technical question of rankness properly arises here. I believe this fee was not paid *two* centuries ago. I am satisfied it was not four centuries back from the value of money at that time. How can I shut my eyes to this consideration, or, if I receive it, decline to be influenced by it? The doctrine of rankness is not a rule of law; it is a question of evidence, and arises as much with respect to one question as to another—to one date as to another. If a defendant covenanted to pay all fees lawfully payable in the reign of Edward III., rankness, or a question analogous, might well arise. I wish to add, I consider this decision quite consistent with the case of *Shephard* v. *Payne*. (2) I think, therefore, the judgment should be affirmed. It is said this will cause a deal of mischief, and deprive persons of property supposed to be perfectly safe. It is obvious that it will only affect usurped claims. If that is objectionable, the legislature must set it right. I say with my Lord Chief

(1) See Law Rep. 2 Q. B. at p. 169.
(2) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158.

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Justice: "Such is the law, and while it so continues, I consider myself, in administering it, as bound to administer it as I find it; nor do I feel myself warranted in undermining or frittering it away by subtle fictions or artificial presumptions inconsistent with truth and fact." (1)

KEATING, J. The defendant in this case is rector of the parish of Horton, in the county of Buckingham, and claimed to be entitled to a fee of 10*s.* as payable to the rector, and 3*s.* to the clerk, for every marriage by banns (with certificate of the same) celebrated in that parish, and the question is whether such claim can be maintained.

The evidence as stated in the special case shewed that as far back as living memory went the fee claimed (with certain immaterial variances) had been paid. Distinct evidence was given of its receipt from the year 1808, and there was nothing to shew that it was not then an ancient fee. There does not seem to be any doubt that a legal origin could be assigned to its payment, and therefore the proof given in this case is that upon which juries in such cases have always been directed that they ought, in favour of long-continued user, to presume it to be immemorial unless the contrary was proved. In the present case no direct proof in contradiction was given; but it was said that the Court, as a jury, ought not to make the usual presumption, because, considering the change in the value of money that has taken place since the reign of Richard I., no such payment as that claimed could have been made at that period, and it must therefore have originated within the time of legal memory; in other words, that the Court was bound to apply to this case the doctrine of rankness, as it is called, which has been applied in cases where the defence of a modus decimandi has been set up in answer to a claim for tithes. Accordingly a majority of the judges of the Court of Queen's Bench considered themselves bound by that analogy, and decided that in consequence of the change in the value of money since the reign of Richard I. the fee claimed in this case could not have been paid at that time; that it was therefore bad for rankness, and upon that ground alone gave judgment for the plaintiff;

(1) Law Rep. 2 Q. B. at p. 179.

Blackburn, J., however, holding that the doctrine of rankness was not applicable to such a case, and giving his judgment for the defendant.

At present the question is whether the judgment of the majority of the Court of Queen's Bench was right. The decision is undoubtedly one the importance of which can scarcely be exaggerated, for it is not easy to see how any fees supposed to be payable in respect of marriages, burials, or baptisms can for the future be sustained if submitted to the same test, even though their existence may have been recognized, and their distribution provided for by several acts of parliament, nor will its effect be confined to ecclesiastical fees, for a rigid application of the doctrine seems to place in peril many, if not the greater number, of ancient fixed payments supposed until lately to repose securely upon long-continued user. That this is not an ill-founded apprehension seems clear from the case of *Lawrence* v. *Hitch* (1), in which the Court of Queen's Bench, applying the same doctrine of rankness, held that a toll of 1*s*., claimed as immemorial by a lord of a manor for every cart with vegetables, &c., for sale coming within the streets of a market town, could not be sustained (although received as long as living memory went back) upon the single ground that it was rank, and could not therefore have been paid in the reign of Richard I., and Blackburn, J., felt bound by the authority of *Bryant* v. *Foot* (2) to concur in the judgment. (3)

It is necessary, therefore, to see what it is that is meant by this doctrine of rankness as applied to an ancient payment. It cannot be intended that in order to make the fee of 13*s*. good in the present case the same number of coins called shillings must have been paid in the reign of Richard I.; for although the shilling was known in England at that time as a measure of value, or, as it is called, "a money of account," yet as a coin it did not exist, its first appearance as a coin being in the reign of Henry VII. (A.D. 1504); nor, I apprehend, can it have been decided that in order to make an ancient payment good it must have remained unchanged, both as to its nominal and real amount, since the time of Richard I., inasmuch as that would be simply impossible.

(1) Law Rep. 2 Q. B. 184, n.
(2) Law Rep. 2 Q. B. 164.
(3) See, however, *Lawrence* v. *Hitch*, in the Exchequer Chamber, post p. 521.

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The pound weight of silver which Henry VII. coined into twenty shillings is now coined into sixty-six; and the copper coinage of England is said to date from the reign of Charles II. The copper penny of our day as little represents the silver penny of Richard I. as the shilling of his time would measure the value of the shilling of the present day. When it is said, therefore, that to make this payment of 13*s.* good the same amount must have been paid in the twelfth century, it is difficult to see how that requirement could be satisfied by shewing a payment of another and different amount, as 13*s.* of that period would certainly be, unless seven or eight ounces of silver can be said to be the same amount as two or three ounces, or that the one remains "fixed and certain" by the payment of the other. It would seem, therefore, if we are to resort to antiquarian research in order to test the possibility of the existence of a payment in remote ages, the real and not the nominal value would be the more reasonable criterion, more especially as in times as early as those of Richard I. payments would seem to have been made in kind, the little and rude money that existed being locked up in the coffers of the barons; but, in truth, an inquiry into the exact value of money at the period referred to would be useless, as even the research of Mr. Hallam could not carry it back further than the reign of Henry III. (1) That its scarcity, and consequently its relative value, was very much greater than at present, there can however be no doubt, although the way in which it was distributed is full of uncertainty. So, also, the difficulty is great to ascertain the natural prices either of commodities or labour in an age when they were regulated, or rather attempted to be regulated, by authority; but it is clear that at a time when the powers of the church and the army predominated, any services performed by either would be likely to be largely remunerated. Thus, according to Hume (2), as late as the reign of Edward III., when the Statute of Labourers (3) fixed the wages of a master carpenter at 3*d.* a day, the wages of a private soldier were 6*d.*, and the pay of a man-at-arms, 2*s.* If, therefore, we are to be driven to speculate upon what might have been the amount of the

(1) Middle Ages, Vol. iii. p. 368, 11th ed. c. ix. part ii.

(2) History of England, c. xvi. s. 14.

(3) 25 Ed. 3, st. 2, c. 3.

marriage-fees paid to the clergy in those ancient times, we may safely presume them to have been very large. In the reign of Richard I., marriages were celebrated, not in church, but at the house of the bridegroom (see Cripps' Law of the Church and Clergy, p. 667), the Bull of Innocent III. first ordaining the celebration of marriages in churches, being in 1199, the year of Richard's death; consequently the services performed by the priest would not be confined merely to reading the marriage ceremony, but would involve travelling expenses, and the labour of writing out the certificate, probably upon vellum, services which, when performed in those days, and by the clergy, would be sure to command a high rate of remuneration, no doubt rendered in kind. Why, therefore, are we to assume it to be impossible that a fee corresponding in amount with that now claimed could have been paid in the reign of Richard I., and why are we to assume it for the purpose of defeating established usage? Of course it cannot be affirmed as a fact that any such payment really was made; but surely the difficulty and uncertainty of the subject shew the wisdom of the long line of judges who have preceded us, in their refusal to enter upon any such inquiry. I say, their refusal to enter upon it, for I am not aware of any case, before the present, in which a claim to an ancient payment, shewn to have been made as far as living memory extends, has been defeated upon the single ground of what is called its rankness; although, probably, in every case in which an immemorial payment has been sustained, such an objection, if valid, would have been fatal. The suggestion that in such cases the immemorial payment has been found by the jury evades, but does not get rid of the difficulty: as if the question did not arise before the Court in banco, it must have been mooted at nisi prius. But juries have always been directed that they ought to make every presumption in support of established user; indeed, in the well-known case of *Jenkins* v. *Harvey* (1), the Court of Exchequer granted a new trial, because the judge had told the jury that they might, from long-continued payment of a port due, presume it to have been immemorial, instead of instructing them that they ought so to presume. The presumption of a lost grant was another, perhaps the strongest,

(1) 1 C. M. & R. 877.

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illustration of the length to which judges and courts have gone in support of established user, not, as was said by Lord Mansfield, in *Eldridge* v. *Knott* (1), "that in such cases the Court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record; but they presume the fact, for the purpose and from a principle of quieting the possession;" and see this principle discussed at length, and fully confirmed, by the Irish Exchequer Chamber, in the recent case of *Deeble* v. *Linehan* (2), where the judge having told the jury, in answer to a question by them, that they must find, as a matter of fact, that a deed had been actually executed, the Court of Exchequer Chamber held it to be a misdirection. Indeed, the progress of judicial decision upon this subject cannot be more forcibly described than in the judgment of the Lord Chief Justice in the present case, who designates it as "judicial legislation" (3), and such it must be admitted to be, but, as I apprehend, wise and beneficial legislation, rendered absolutely necessary by the previous "judicial legislation," which established the reign of Richard I. as the extent of legal memory. "The legislature," says the Chief Justice, in giving judgment in this case (4), "having thus adopted the reign of Richard I. as the date from which the limitation in a real action was to run, the courts of law adopted it as the period to which, in all matters of prescription or custom, legal memory, which till then had been confined to the time to which living memory could go back, should thenceforth be required to extend." The presumption, therefore, to be made from usage as far as living memory goes back, and the necessity for such presumption, both stand upon precisely the same "judicial legislation;" and to insist upon the one and reject the other is, as it seems to me, to accept the bane and refuse the antidote.

The doctrine of rankness, as applied to cases of modus, was of comparatively recent origin, clearly exceptional, and not always acquiesced in. Its origin is stated in the case of *Sansom* v. *Shaw* (5), cited by Mr. Harington in his argument in the

(1) 1 Cowp. at p. 215.
(2) 12 Ir. C. L. Rep. 1.
(3) Law Rep. 2 Q. B. at p. 181.
(4) Law Rep. 2 Q. B. at p. 180.
(5) 2 Eag. & Y. 120.

case of *Lawrence* v. *Hitch* (1), where Belfield, Sergt., arguendo said, "as to rankness, he was so old as to remember almost its beginning; Lord Chief Baron Ward first introduced it. He was a great patron of the clergy, and carried their rights a great way." The Court, in the same case, treated the doctrine with scant courtesy. Willes, C.J., in giving judgment, said: "The first of these objections is that the modus is too rank, and therefore cannot be so old as the time of Richard I., the time of prescription, for that 10*d.* then would be 20*s.* now. It is said, and I am afraid truly, that there have been many cases determined upon this footing. The fewer the better; but I am glad they are not in point, for then they might have misled more than they have already." . . . "It is a strange notion, and most so in the present case. What is it founded upon? That it is not likely that the owners of lands would agree to pay more than the value of the lands. But we cannot go upon presumptions, but proof; and what proof is there of the value of lands in this country in the time of Richard I.?" He then expresses an opinion that, according to Litt. s. 170, the time of Richard I. was not the time of prescription, adding, "If the time of Richard I. was time immemorial in Henry VI.'s time, the time of Henry VI. is immemorial now." Burnett, J., in his judgment in the same case, after stating his opinion upon the subject of prescription, proceeds: "My Brother Belfield has given us the history of the beginning of the doctrine of rank modus in Lord Chief Baron Ward's time, and I have had another case given me by a learned judge, which shews the end of it, the case of *Giffard* v. *Webb* (2), in the Exchequer. That was a bill for tithes in kind by the rector of Stoke, and the defendant set up a modus of 3*d.* for every lamb fallen. It was insisted that this would be equal to 30*d.* now for every lamb, and was therefore bad, yet it was decreed in favour of the modus, and the decree was confirmed in the House of Lords (3) on appeal there in 1735, and there was an end of rank moduses. I believe they have never been heard of since." It is needless to say that the anticipations of the learned judge have not been realized; the doctrine continued to be applied to some cases of modus, but never extended beyond them until the present case.

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(1) Post, p. 521. 522 (2) 2 Eag. & Y. 28. (3) 7 Bro. P. C. 15.

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Not to go through the various cases in which ancient payments have been sustained as immemorial, although the objection of rankness, if valid, would have been fatal, and many of which have been adverted to by Blackburn, J., in his judgment in the Court of Queen's Bench (1), we may come at once to the recent case of *Shephard* v. *Payne* (2), where the Court of Common Pleas upheld a claim for immemorial fees of 7*s.* 6*d.* and 4*s.* 6*d.*, payable to the registrar of the Archdeaconry Court of Colchester, upon the ground that a reasonable fee may be claimed by prescription, and that those claimed, upon the facts stated in the special case, were reasonable. In that case it was argued that the fees were rank, and that they were so according to the test in the present case there could be no doubt; but that objection was met by the Court holding that the fee "need not be of a fixed and ascertained, but may be of a reasonable, amount." Even if such an objection could be applicable to such a claim, the reasoning in *Shephard* v. *Payne* (2) appears to me to be equally applicable to the present case. It was said it could only be so when the fee is payable for work and labour done: but here the fee in its origin was probably for work and labour done, and at the present time appears to be so, including, as it does, not only the services of the clergyman and clerk, but also the writing out the certificate of marriage. The case of *Shephard* v. *Payne* (3), was carried to the Exchequer Chamber and that Court affirmed the decision of the Common Pleas, not upon the ground taken in that Court, as to which the majority gave no opinion, but upon the ground that the facts stated in the case were such that "it should be presumed the fees of 7*s.* 6*d.* and 4*s.* 6*d.* were immemorial fees attached to the office of the registrar, if that prescription were necessary to give them validity." Now that those fees were rank according to *Bryant* v. *Foot* (4), I should have thought nobody could seriously doubt. To suppose that the registrar of the archdeacon of Colchester really received those identical fees in the reign of Richard I., is at least as difficult to believe as that the fees now claimed were then paid to the rector of Horton; yet the Court decided (notwithstanding such

(1) Law Rep. 2 Q. B. at p. 172.
(2) 12 C. B. (N.S.) 414; 31 L. J. (C.P.) 297. 9 Jur (N.S.) 354
(3) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158. 10 Jur (N.S.) 540
(4) Law Rep. 2 Q. B. 161.

rankness) that the ordinary presumption from long user ought to be made. That decision, therefore, appears to me to be a distinct authority against the decision of the majority of the Court of Queen's Bench in the present case. It was said in the Queen's Bench in the present case that the point of rankness was not taken by the learned counsel who argued the case of *Shephard* v. *Payne* (1) for the appellant in the Court of Exchequer Chamber. The fact that Mr. Mellish did not take the point, considering he was on the losing side and wanted a good point, is in itself not without significance; but it certainly was taken in the Court of Common Pleas, and although it was not formally taken in the Exchequer Chamber, yet that it was present to the mind of that Court in giving judgment seems clear from the terms of the judgment itself. "The true rule," says Blackburn, J., in delivering the judgment of the Court (2), "seems to be laid down by Lord Wensleydale in *Jenkins* v. *Harvey* (3), where he says 'that the correct mode to direct a jury is to tell them that, from uninterrupted modern usage, they should find the immemorial existence of the payment (if that be necessary for its validity), unless some evidence is given to the contrary;' or, as he says, in delivering the written judgment of the Court on the second trial of the case (4), 'from proof that an office existed in 1752, the jury may and ought to presume it to be prescriptive, if that be necessary to make it valid, unless the contrary be proved.' The claim in that case was by the corporation of Truro for a metage due of 4*d.* per chaldron for coals in that port, and it was supported. I mention this as shewing what is meant by the latter part of the sentence quoted. I suppose neither the Barons of the Exchequer nor the jurors, as antiquarians, believed that 4*d.* per chaldron was actually paid before Richard I. returned from the Holy Land: but the modern user was enough to cast upon the other side the onus of proving that it was a usurpation. . . . We think, therefore, that if it be necessary for the validity of these fees that fees of that amount should be immemorial, that presumption ought to be made." This was the judgment of Pollock, C.B., Bramwell and Channell, BB., and

(1) 16 C. B. (N.S.) 132; 33 L. J. (C. P.) 158. 10 Jur N.S. 540

(2) 16 C. B. (N.S.) at p. 135; 33 L. J. (C.P.) at p. 161. 10 Jur N.S. 543

(3) 1 C. M. & R. at p. 894.

(4) 2 C M. & R. at p. 407.

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Blackburn and Mellor, JJ., agreeing with the Court of Common Pleas both in their judgment and the reasons upon which it was founded: in support of which see also the authorities collected in the judgment in the case of *Mills* v. *The Mayor of Colchester*. (1) Upon these grounds, therefore, agreeing as I do with the judgment of Blackburn, J., in the Court below, I am of opinion that the claim of the defendant to the fees in question cannot be defeated upon the ground of rankness, as applied by the majority of the Court of Queen's Bench.

There remains the question of fact: Are the fees claimed reasonable? And, looking to the statements in the special case, I cannot say they are otherwise than reasonable. It appears that the fees claimed, including the certificate, have been paid, as far as living memory extends, without demur, and they would probably have so continued had not the clergyman insisted upon what he had no right to insist on, namely, pre-payment. It appears also that although the fees claimed are considerably higher than in the majority of the neighbouring parishes, yet that the fees in some are the same, and in one or two somewhat larger than those here claimed; nor do I think the charge to the labourer of the fee claimed less reasonable or more opposed to public policy than the demand of 5*s*. by the lay registrars. The Marriage Acts themselves recognize a difference in the remuneration for similar work to the clergyman and the registrar, and the labourer can, if he pleases, be married at the statutable price. Upon the whole, I am of opinion that the judgment of the Court of Queen's Bench ought to be reversed.

Judgment affirmed. (2)

Attorneys for plaintiff: *Stephens, Smith, & Co.*
Attorneys for defendant: *Dale & Stretton.*

(1) Law Rep. 2 C. P. at p. 485.

(2) See the next case.

[IN THE EXCHEQUER CHAMBER.]

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May 11.

LAWRENCE *v.* HITCH.

Toll—Market Toll—Reasonable Toll—Rankness—Prescription—Legal Origin.

In 1220, the manor of Cheltenham, with a market and fair, was granted by Henry III. to the inhabitants for four years. Charles I. granted the manor in fee to persons through whom the plaintiff claimed, with all and singular the tolls due by reason of markets, &c., within the lordship. From time immemorial until 1786, there was a market-house in the High Street of Cheltenham belonging to the lord of the manor, and 1*d.* per basket for butter sold there, and 1*d.* per pot for butchers' meat hawked about the town was paid, and from 1*s.* 6*d.* to 2*s.* 6*d.* per day was paid to the occupiers of houses for stalls erected before the houses, and 1*d.* to the lord. From 1786 down to the present time, different local acts have been passed under which a new market-house has been erected; but in all the acts the rights of the lords of the manor were strictly preserved. As long as living witnesses can remember, a board has been fixed in the market with the market tolls, and the "tolls payable by all persons hawking about the town fish, fruit, vegetables, or other articles for which no toll has been taken in the market," inter alia, 1*s.* for every waggon, cart, horse, or ass load. These tolls were proved to have been collected regularly, as of right, since 1810 till 1863, when the defendant refused to pay the plaintiff, the present lessee of the tolls, the toll of 1*s.* for a cartload of vegetables and fruit brought into and hawked about the town. On a case in which the Court were to draw inferences of fact:—

Held, that on the facts it ought to be presumed that the toll of 1*s.* had been taken from time immemorial, and that, if the doctrine of rankness applied, the other facts went to show that 1*s.* for a cartload of vegetables was not unreasonable in the time of Richard I.:

Held also, that the claim might be sustained as a claim to a reasonable toll, which might vary in amount with the value of money:

Held also, that a lawful origin of the toll might be presumed within legal memory, by means of a dedication of the streets to the public and a contemporaneous reservation of this toll on the part of the Crown, between the time of Henry III. and Charles I.

ERROR from the judgment of the Queen's Bench in favour of the defendant on a special case. (1)

The action was brought to recover certain tolls claimed by the plaintiff as lessee of the tolls of the manor of Cheltenham, in respect of the defendant having brought into, and hawked about, and in, the streets of Cheltenham, within the manor of Cheltenham, vegetables and fruit.

There was also a count for disturbing the plaintiff's market.

(1) Law Rep. 2 Q. B. 184, n.

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The defendant traversed the plaintiff's right to the tolls; and denied that he had disturbed the plaintiff's market.

At the trial, before Keating, J., at the Gloucester spring assizes, 1865, a verdict was taken for the plaintiff, subject to a case to be settled by an arbitrator, the Court to have power to draw inferences of fact.

The case was very voluminous; but the substance is sufficiently stated in the judgment of the Court, and notes.

The questions for the Court were: 1. Whether the defendant had incurred any liability in respect of the tolls claimed. 2. Whether the defendant had disturbed the market as alleged.

The Court of Queen's Bench gave judgment for the defendant, on the ground that the toll claimed of 1s. for every cartload of vegetables hawked about the streets of Cheltenham was unreasonable, on the authority of *Bryant* v. *Foot*. (1)

Feb. 1 and 3. *Harington*, for the plaintiff. The toll claimed in the present action is shewn to have been taken, as of right, as far back as living memory goes, and a jury ought to find, on such evidence, that it existed from time immemorial: *Rex* v. *Joliffe*. (2) On what amount of evidence ought a judge to direct the jury that this presumption is rebutted? Not on a mere counter presumption; but on positive proof. But if a mere presumption is sufficient, the presumption from the value of money is, of all tests, the most fallacious. There are however very numerous cases where this doctrine of rankness, or the presumption derived from the present amount of the toll, might have been applied, and was not: *Prior of Tikeford* v. *Prior of Caldwel* (3); *Vinkerstone* v. *Ebden* (4); *Bennington* v. *Taylor* (5); *Wilkes* v. *Kirby* (6); *Anonymous*. (7) In fact, the doctrine of rankness was introduced, according to Eagle on Tithes (8), since 1650; and that it ought not to be carried further, is shewn in the case of *Sansom* v. *Shaw*. (9) In *Jenkins*

(1) Law Rep. 2 Q. B. 184, n.
(2) 2 B. & C. 54.
(3) 34 H. 6. f. 36.
(4) 1 Salk. 248; 5 Mod. 359; 12 Mod. 216; 1 Raym. 384; 3 Raym. 148.
(5) 3 Lutw. 1517.
(6) 3 Lutw. 1519.
(7) 21 H. 7. f. 40; M. T. pl. 61.
(8) Eagle on Tithes, 186, n.
(9) 2 Eag. & Y. 120; see the case given at length in the judgment of Keating, J., in *Bryant* v. *Foot*, ante p. 516.

v. *Harvey* (1), the doctrine was held expressly not to apply to port dues, because there might be an adequate consideration for the toll. So in *Anonymous Case* in Keilwey (2), a toll (called a toll thorough, but really a toll traverse) of 2*d.* for every cartload of vendibles passing through a manor, was upheld on the ground of the easement. To the same effect is *Crispe* v. *Belwood* (3), and *Pelham* v. *Pickersgill.* (4) Secondly; if the question of rankness is admissible as a counter presumption against the presumption of immemoriality arising from uninterrupted modern user, the presumption from the value of money is of all criterions the most fallacious. A shilling of the present day contains less than one-third of the silver represented by a shilling of the time of Richard I. Hallam (Middle Ages, vol. 3, pp. 368—370, 11th ed.) points out the difficulty of approximating to anything like accuracy earlier than the time of Henry III. and Edward I.; he there gives what he calls a sort of approximation of the relative prices of those times with our own; and comes to the conclusion that any given sum, in those reigns, may be taken as equivalent to twenty-four or twenty-five times its nominal value at present. Taking it only at twenty times, and then taking these data with the amount of rent reserved in the time of Henry III., and the particulars in the grant of Charles I., and carrying out the argument strictly, the result would give a rather startling amount as the value of the manor of Cheltenham in those days. This shews the fallacy of drawing an argument from the relative value of money. But, thirdly, the plaintiff is not bound to shew that the toll existed from the time of legal memory. The manor was in the hands of the crown from the time of Henry III. to Charles I.; and it may well be that between those two dates there may have been a grant from the crown of the streets to the public and a reservation of this toll. By setting out a street the owner does not part with the ownership of the soil: *Lade* v. *Shepherd.* (5)

(1) 1 C. M. & R. 877; 2 C. M. & R. 393.

(2) Keilwey 152, pl. 54: the words are "de chescun charret de choses vendables 2d, et de chescun *souvage* 1d." Souvage is an evident misprint, counsel conjectured "scavage," a toll for exhibiting for sale; but Willes, J. suggested "sommage," burden, as the right word.

(3) 3 Lev. 425.

(4) 1 T. R. 660.

(5) 2 Str. 1004.

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[WILLES, J. *Dovaston* v. *Payne* (1) is quite sufficient authority for that.]

Rickards v. *Bennett* (2) is precisely in point, and the judgment of each member of the Court shews that the mere dedication of the way, or the allowing the use of the soil is sufficient consideration without more for the toll; and a still wider prescription was sustained in *Mayor of Carlisle* v. *Wilson.* (3) The dedication of a road need not be absolute, it may be sub modo: *Marquis of Stafford* v. *Coyney* (4); *Fisher* v. *Prowse.* (5) But this toll is more than a mere toll traverse; it is in the nature of compensation to the lord of the manor for the damage done to his market by selling on the lord's own soil in the neighbourhood of the market. In *Mayor of Colchester* v. *Brooke* (6), Coltman, J., was of opinion that a person might be liable by ancient custom to make a reasonable payment to the lord of the manor, as owner of the soil of the river where there were oyster beds, for grounding his vessel on the soil; and this was approved by Lord Wensleydale in *Gann* v. *Whitstable Free Fishers.* (7) Lastly, the toll need not be fixed, it need only be reasonable, varying according to the value of money, and this whether it be taken as immemorial or as dating its origin since the time of Richard I. on the dedication of the streets. In *Shephard* v. *Payne* (8), Willes, J., delivering the judgment of the Court, says: "It was argued that, considering the increase in the value of money since the epoch of legal memory, the claim was rank. This reasoning, however, if applicable to such a fee, is not conclusive of the present case; for a fee need not be of a fixed and ascertained, but may be of a reasonable, amount." And this doctrine was again approved in *Mills* v. *Mayor of Colchester* (9), and the present case dissented from, and many authorities are there cited, to which may be added 2 Inst. 222: "At this day there is not one certain toll to the market taken, but if that which is taken be not reasonable, it is punishable by this statute (West. prim.), and what shall be deemed in law to be reasonable shall be judged, all circumstances

(1) 2 H. Bl. 527.
(2) 1 B. & C. 223.
(3) 5 East, 2.
(4) 7 B. & C. 257.
(5) 31 L. J. (Q.B.) 212; 3 B. & S. 770.
(6) 7 Q. B. at p. 355.
(7) 11 H. L. C. at p. 214; 20 C. B. (N.S.) at p. 19; 35 L. J. (C.P.) at p. 37.
(8) 12 C. B. (N.S.) at p. 433; 31 L. J. (C.P.) at p. 304.
(9) Law Rep. 2 C. P. at pp. 484–5.

considered, by the judges of the law, if it come judicially before them." In Gunning on Tolls, at p. 63, edit. of 1833, citing from a MS. report of *Wright* v. *Brewster* (1) a dictum of Taunton, J., is given, which is not noticed in the printed report. "During the argument Taunton, J., expressed an opinion that under a grant of reasonable toll (or, which is the same thing, under a prescription which supposes such a grant), the amount *might vary* from time to time, according to the varying value of money; but he gave no express judgment on that point."

[WILLES, J. There are many direct authorities that the grant of a reasonable toll is good: Com. Dig. tit. Toll (E); *Heddey* v. *Welhouse* (2); *Rex* v. *Corporation of Maidenhead.* (3)]

It may also be observed that there can be no doubt that in the time of Richard I. the toll must have been taken in kind, Henry II. having collected an immense treasure and sent it out of the country for the Crusades. Lastly, the defendant was guilty of a disturbance of the market. *Prince* v. *Lewis* (4) was cited below for the defendant; but it is no authority against the plaintiff in the present case, as it is expressly found that there was room in the market for the defendant. *Bridgland* v. *Shapter* (5) is a direct authority to shew that the defendant is liable as fraudulently evading the market.

Macnamara, for the defendant. It is necessary to keep in view what the claim is, and on what foundation it rests. The claim is to a toll of 1s. for every cartload of vegetables brought into the streets of Cheltenham, and there is no continuing consideration from the lord of the manor; therefore the claim can only be supported as a toll *traverse*, and it must be subject to all the incidents of such a toll; and the right to be sustained must proceed on the ground that the lord of the manor dedicated the road with a reservation of the toll, and this reservation must be contemporaneous with the dedication, and must be once for all on the dedication; and there can be no consideration for any subsequent reservation; and in this it differs from fee of office, or toll for services done, and from toll thorough, or toll for a market which

(1) 4 B. & Ad. 116, nom. *Wright* v. *Bruister.*

(2) Moore, 474.

(3) Palm. 76.

(4) 5 B. & C. 363.

(5) 5 M. & W. 375.

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is kept up as a consideration for the payment of the toll. It is therefore clear that the toll must be fixed, as it would be most unfair if the lord might vary it from time to time; how is a jury to assess or fix what is reasonable? In Gunning on Tolls, p. 27, it is said toll traverse needs no consideration: Fitz. Ab. tit. Toll, pl. 3, that is, no continuing consideration, and for this reason it must be fixed at the time of dedication of the road. So in *Brett* v. *Beales* (1), Lord Tenterden says: Toll traverse arises when the owner of the soil dedicates the road to the use of the public, but reserves toll at the time of dedication." It is quite clear that the claim in the present case is an immemorial toll traverse; in paragraph 4a it is stated that from time immemorial there has been a market, and it cannot be assumed that the streets have been dedicated since.

[WILLES, J. There is nothing to prevent the lord of a manor from holding the market wherever he likes. Payment for hawking goods about the streets is something more than a toll traverse.]

Then as to the amount, it is clear that a toll must be of a reasonable amount; thus in *Heddy* v. *Wheelhouse* (2), Popham, C.J., says: "The king cannot appoint a burthensome toll; but it ought to be a petit sum, as a penny or twopence, which are the smallest coins, or of lesser, but not of any greater value to charge the subject." In *Rex* v. *Corporation of Maidenhead* (3), there was the grant by charter of a market toll, which involves the consideration of keeping up the market, and is therefore clearly distinguishable from the present case. In 2 Eagle on Tithes, p. 185, 2 Blackstone's Comm. p. 31, is cited, shewing that the doctrine of rankness is a mere rule of evidence, drawn from the improbability of the fact; the doctrine, therefore, is just as applicable to any other payment sought to be supported by immemorial custom or prescription as to a modus. In *Traherne* v. *Gardner* (4), Lord Campbell assumed that the doctrine of rankness applied to fees payable on admittance to a copyhold. See also the remarks of Willes, C.J., in *Mayor of Nottingham* v. *Lambert*. (5) It is said that the value of money is an uncertain test; but it has always

(1) Mood. & M. at p. 428.
(2) Cro. Eliz. at p. 559.
(3) Palm. 76.
(4) 5 E. & B. at p. 940; 25 L. J. (Q.B.) at p. 205.
(5) Willes, at p. 117.

been adopted in the case of a modus. Now, that a toll of 1*s.* for a cartload of vegetables would have been excessive in the time of Richard I. is shewn from the price of commodities, labour, &c., in those days and even later. Thus it appears from the annals of Roger de Hovenden (1), upon an inquisition in 1194, the price set upon a bull, a cow, or plough-horse, was 4*s.*, upon a sheep with fine wool, 10*d.*, with coarse wool, 6*d.*, and upon a sow or boar, 12*d.* So again by Magna Charta, 9 H. 3, c. 21, the hire of a carriage with two horses, was 10*d.* a day; with three horses, 14*d.*, and by the Statute of Labourers 25 Edw. 3, stat. 2 (commonly stat. 1), c. 3, a master mason's wages were fixed at 4*d.*, an under mason, 3*d.*; a master carpenter, 3*d.*, their man, 1*d.* In Bishop Fleetwood's Chronicum Preciosum, (see pp. 57—61, 76), cited as an authority by Lord Hardwicke, in 2 Vesey Sen., at p. 514, it appears that a quarter of wheat in 1154, cost 1*s.*, in 1237, 3*s.* 4*d.* None of the cases cited were cases of toll traverse. *Vinkestone* v. *Ebden* (2), and *Wilkes* v. *Kirby* (3), were both cases of port dues, which had existed from time immemorial. *Bennington* v. *Taylor* (4), was the case of stallage by prescription. *Anonymous*, 21 H. 7, pl. 61, was the case of pound breach, and the payment was in the nature of a penalty. *Rickards* v. *Bennett* (5) is no authority for the plaintiff, the jury having found the prescription, the Court felt bound to support the finding if possible; and Holroyd, J., points out that in order to support, as a toll traverse, a toll which primâ facie would be a toll thorough, it is necessary to shew that the highway did not exist before the toll. In the present case the toll and roads are both immemorial, and the origin of neither is shewn. In the *Mayor of Carlisle* v. *Wilson* (6), a toll was demanded for goods in carriages passing through the city, and it was shewn that the corporation was liable to repair all the streets, which at once distinguishes the case. *Shephard* v. *Payne* (7), was the case of an office. *Mills* v. *Mayor of Colchester* (8), was the case of a licence to fish, and the Court went out of their way in commenting as they did on *Bryant* v.

(1) Vol. ii. p. 337, edit. by Riley: Bohn, 1853.
(2) 1 Salk. 248.
(3) 3 Lutw. 1519.
(4) 3 Lutw. 1517.
(5) 1 B. & C. 223, 233.
(6) 5 East, 2.
(7) 31 L. J. (C.P.) 297; 12 C. B. (N.S.) 414.
(8) Law Rep. 2 C. P. 476.

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Foot (1), and the present case. *Wright* v. *Brewster* (2), was the case of a market toll. The argument in *Rex* v. *Mayor of London* (3), is very much in point. It shews, that when once the king has granted a market, he cannot afterwards grant toll. Lastly, as to the disturbance of the market, *Holcroft* v. *Heel* (4) shews that an action for the disturbance of a market cannot be sustained without shewing a right to the tolls and the consequent loss, which is not shewn in the present case; and an intention to evade the payment of the market toll must be shewn: *Edwards* v. *Mayor of Brecon.* (5)

Harington, in reply. This is not the case of a simple toll traverse; this consideration at once removes most of the argument of the other side. There may be a disturbance of a market, though the sale complained of do not take place on the market day: see notes to *Yard* v. *Ford.* (6)

Cur. adv. vult.

May 11. The judgment of the Court (Kelly, C.B., Willes, Keating, and Montague Smith, JJ., and Channell, B.), was delivered by

KELLY, C.B. The plaintiff in this case claims a toll called a street toll, of 1*s.* in respect of a cartload of vegetables exposed for sale in a street within the town and manor of Cheltenham, and for which no toll had been before paid in the market.

The plaintiff is the lessee, under a lease, of tolls commonly called the street tolls, and also of the markets of the town of Cheltenham, granted to him on the 2nd of September, 1863, by Robert Sole Lingwood, lord of the manor, who holds the manor under a conveyance from Lord Sherborne, of the 7th of January, 1863. Lord Sherborne had been lord of the manor from 1813 until the making of the above conveyance.

The earliest record of the manor of Cheltenham is, that it was granted by Henry III. to the inhabitants, together with a weekly market and annual fair there, for a term of four years from the year 1220. (7) King Charles I., in the third year of his reign, by

(1) Law Rep. 2 Q. B. 161.
(2) 4 B. & Ad. 116; Gunning on Tolls, 63.
(3) 2 Show. at p. 277.
(4) 1 B. & P. 400.
(5) 1 H. & C. 51.
(6) 2 Wms. Saund. 174.
(7) At the yearly rent of 64*l.*

letters patent under the great seal, granted to C. Herbert and others, their heirs and assigns, the manor of Cheltenham, with all rents of assize, free and customary lands within the lordship or manor, and inter alia, all and all manner of tolls within the lordship, manor, and hundred of Cheltenham, and all and singular tolls due, or to be due, by reason of all and singular markets, fairs, and marts within the lordship, manor, and hundred, aforesaid. (1)

(1) The statement of the grant is as follows:—Par 4. "In 1617, the then Prince of Wales, afterwards King Charles I., was the immediate and only chief lord of the soil within the manor of Cheltenham, and Charles I., in the third year of his reign, granted letters patent under the great seal, and under the seal of the duchy of Lancaster, and under the seal of the county palatine of Lancaster, by which, after various recitals not material to the present question, he granted to Charles Herbert and others, their heirs and assigns for ever, amongst other things, "all that our lordship, or manor, or hundred of Cheltenham, with all its rights, members, and appurtenances, in the county of Gloucester, and all those rents of assize as well of free as customary lands within the lordship, or manor, or hundred of Cheltenham aforesaid, yearly payable by the particular, amounting to 54*l.* 18*s.* 10½*d.* per annum, and all those services of the tenants of the manor, or hundred of Cheltenham aforesaid, valued 6*l.* 12*s.* 8*d.* per annum, and all those certainties, wages, or customs anciently to any view of frankpledge within the said manor belonging to the particular, then amounting to 8*s.* 4*d.* per annum, and all those payments then usually called Peterpence by the particular, then amounting to 5*s.* per annum. And all those demesne lands of the manor of Cheltenham aforesaid, with all their rights, members, and appurtenances in the county of Gloucester aforesaid. And all that demesne pasture in Cheltenham aforesaid now or lately occupied by the burgesses of Cheltenham aforesaid then mentioned in the particular to be in the whole of the yearly rent or value of 14*l.* 14*s.* And also all those woods, underwood, and woody ground called or known by the name of Ockley Wood, situate, lying, increasing, and being in Cheltenham aforesaid, in the said county of Gloucester, now or late in the tenure or occupation of Eleanor Liggon, or her assigns. And all woods, underwoods, and trees of whatever kind growing or being out of, in, and upon the aforesaid woods and woody ground, and all the ground and soil of the said woods, and underwoods, and trees of each parcel thereof then mentioned by the particular to be of the annual rent or value of 20*l.* And also all and all manner of tolls within the lordship, manor, and hundred of Cheltenham aforesaid, and whatsoever is thereunto happening, befalling, or arising. And all and singular tolls due to us or to be due by reason of all and singular markets, fairs, and marts within the lordship, manor, and hundred aforesaid, and every of them held and to be held by the particular then amounting to 6*s.* 8*d.*, and all and singular perquisites and profits of court of the said lordship, or manor, and hundred of Cheltenham from time to time coming, increasing, or happening in such lordship, or manor, and hundred of Cheltenham, and other the premises in the said county of Gloucester by a particular thereof are mentioned to be

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The lordship, manor, and hundred of Cheltenham, with all customs and tolls within them, and the tolls of markets, fairs, and marts so granted by the said letters patent, became vested in 1806 in the then Lord Sherborne, and passed from him through his successor in the title, as before mentioned, to Lingwood the lessor of the plaintiff.

The case finds (1) that from time immemorial, until the year 1786, there was a market-house in the high street of Cheltenham belonging to the lord of the manor, and that various tolls, as well of the market as for articles hawked about the town, and for stalls and standings for the sale of articles erected in the streets, had been immemorially paid.

In 1786 the public local act, 26 Geo. 3, c. 116, was passed for paving and lighting the town of Cheltenham, under which the market house was pulled down, and a new market house erected.

By s. 43 of this act it is enacted "that nothing in this act shall extend to prejudice, lessen, or defeat the lord of the manor of Cheltenham, or the lord of the fairs and markets, of any power, privilege, franchise, or authority, but that all such power, &c., shall be exercised and enjoyed in as full and ample a manner as before the passing of this act." A similar provision is contained in s. 125 of the 46 Geo. 3, c. cxvii., passed in the year 1806; and again, s. 140 of the 1 & 2 Geo. 4, c. cxxi. (1821), and s. 133 of the 15 Vict. c. l. (1852), are to the same effect. (2) In 1807, the

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as the whole of the yearly rent or value of 81*l.* 5*s.* 6½*d.*, and to have been the lands of our dear brother Harry, late Prince of Wales, and heretofore parcel of the possessions of the late monastery of Sion." [A copy of the translation of the letters patent accompanied the case. But no particular or copy of any particular could be found.]

(1) The following is the statement in the case:—Par. 4a. "From time immemorial until the year 1786, there were a market-house and butter-cross belonging to the lord of the manor in the High Street of the town, and a toll of 1*d.* per basket for butter sold at the butter-cross, and 1*d.* for butcher's meat hawked about the town, were charged and paid; and stalls and standings for the sale of different articles were erected in the streets of the town (which are still allowed to be erected on fair days), and a sum of from 1*s.* 6*d.* to 2*s.* 6*d.* per day was paid to the occupiers of houses before which the stalls were erected for leave to put them there, and a toll of 1*d.* per day was paid to the lord of the said manor in respect of the things sold in the stalls."

(2) Par. 9a. The 83rd section of 15 Vict. c. l., is as follows:—"Whereas certain fairs, markets, mops, and hirings have hitherto been held in the High Street, and other streets and

Cheltenham Commissioners, appointed under the act of 1806, became the lessees under Lord Sherborne of the tolls of the market and town; and the commissioners under that act, and the subsequent acts, had taken the tolls of the town and markets, which had also been subsequently let by auction. (1) The tolls had been thus taken, of an amount appearing by printed handbills and upon painted boards set up for the purpose, from 1806 until the present time. Upon one of the boards, exhibited in 1841, it appears that a toll was taken, "payable by all persons hawking about the town fish, fruit, vegetables, or any other articles for which no toll has been before paid in the market," of 1*s.* for, inter alia, every cartload (2); and the case expressly finds that for many years previous to 1841, and as long as living witnesses can remember, and continuously down to the present time, a similar

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places within the town of Cheltenham, and such fairs, markets, mops, and hirings are a great nuisance, obstruction, and inconvenience to such streets and places, and to the inhabitants thereof, and the public in general, and it is expedient that the same should be prevented and removed from and out of such streets and places in manner hereinafter mentioned,—Be it enacted that, after the passing of this act, no person shall hold any fair, market, mop, or hiring, in, upon, or about the High Street, or any other street within the borough, nor erect or place in, upon, or about the same, or any of them, any stall, stand, booth, carriage, or thing whatsoever for the purpose of selling or exposing to sale any goods, wares, or merchandize, or any articles or things usually sold in fairs or markets, or under any other pretence whatsoever; nor shall any person stand or loiter in or about the High Street, or any other street aforesaid, for the purpose of being hired, and that all such fairs, markets, mops, and hirings, shall from henceforth be held in the present public market-place in the borough of Cheltenham, or at such other place or places upon private property as the person entitled to the said markets shall from time to time direct and appoint; and all persons who shall so erect or place any stall, standing, booth, carriage, or thing, and all persons, except licensed hawkers acting as such, who shall sell or expose for sale any goods, wares, or merchandize, or any article or thing usually sold in fairs or markets, and all persons who shall stand or loiter for the purpose of being hired in, upon, or about the High Street, or any other street as aforesaid, after the passing of this act, shall forfeit for every offence any sum not exceeding 10*l.*"

(1) From 1812 to 1820 at rates increasing from 345*l.* in 1813 to 630*l.* in 1820. Post 533

(2) The board contained the market tolls as well. The tolls on the board for hawking were: "per waggon, cart, horse, or ass load, 1*s.*; per wheel or hand-barrow, 4*d.*; per pot or half-bushel basket, 3*d.*; per hand-basket of butter, 2*d.*; per ditto of fruit, vegetables, or other article, 1*d.*"

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board with similar words and figures has always been fixed in a conspicuous part of the market-house at Cheltenham, for the time being. (1)

We think, having power to draw inferences of fact, that upon this evidence we ought to find, as indeed, in substance the arbitrator has found, that this toll has been taken from time immemorial; and further, supposing that by reason of its amount, or upon any other ground, it cannot be held to have been payable and paid as early as the reign of Richard I., we are of opinion that if it can have had a lawful origin within time of memory, such lawful origin ought to be presumed.

If, however, it is to be considered as a toll claimed to have been taken from time immemorial, and the objection of rankness be made on the authority of *Bryant* v. *Foot* (2), and supposing that

(1) There was also the statement in the case, par. 30:—"The said tolls were continuously collected in the streets of Cheltenham as a matter of right from about the year 1810 till 1863, with the exception of about two years after the passing of 15 Vict. c. 1., during which the country people ceased to sell in the streets; but at no time has the lord of the manor relinquished any claim to these tolls." The case then set out the evidence of many persons who had been engaged by the lord or his lessee to collect the tolls. The mode of collecting from 1813 being, that the collectors appointed met the people coming into the town from the neighbouring villages, and demanded the toll according to the quantity of butter, fruit, &c., that they had for sale, and the collectors gave them a ticket specifying the toll that had been paid. The toll was always paid, or enforced by seizure of some article.

Par. 34. "The defendant is a market gardener, living at a village about three miles from Cheltenham. He is in the habit of coming into Cheltenham on the market days, namely, Tuesdays, Thursdays, and Saturdays, with a horse and cart, laden with vegetables, such as potatoes, cabbages and carrots, and fruit, such as apples and pears. There are places set apart in the Cheltenham market-house for the sale of vegetables and fruits of such a kind as the defendant brings into Cheltenham, and the defendant would be allowed to sell his goods in such market-house, in which there is ample room for this purpose, if he chose to do so, on payment of the customary toll. Instead, however, of using the market-house, he hawks the goods about the streets of Cheltenham, within the manor of Cheltenham, and was engaged in doing so, and in selling his goods in the said streets, and near to the place where the market was holden on divers days from the beginning of September to the end of December, 1863. On each of those days the plaintiff, or a person employed by him for the purpose, demanded a toll of 1s. of the defendant in respect of his cartload of goods, and on each of those days the defendant declined to comply with the demand so made. One of those days, viz. the Thursday in the week, was a market-day at Cheltenham."

(2) Ante, p. 497.

objection to apply to a toll at all, we must take the finding altogether; and it appears as part of that finding, and of the prescription so found, that no less than 2*s.* 6*d.* was taken as a toll or payment for the use of the ground by placing upon it a stall for the sale of provisions, and payable to the occupier of the house opposite to which the stall was placed. (1) If then we are bound by these findings, and must take the streets and markets to be immemorial, so we must admit the payment of 2*s.* 6*d.* for a stall, which, if really paid in the time of Richard I., would make a toll of 1*s.* for a cartload of provisions a perfectly reasonable payment, and so put an end to the objection of rankness.

But, even if this, or any other objection could prevail, treating the claim as immemorial, it is clear that we may dispense with the claim by prescription, and presume a lawful origin of the toll by means of a contemporaneous dedication of the streets to the public, and a reservation of this toll on the part of the Crown; such dedication and reservation having been made within time of memory.

Whether, therefore, the toll be claimed by prescription, or as having been granted or reserved within time of memory, we think that the claim is sustainable, unless the doctrine of rankness apply, and the amount of the toll (1*s.* per cartload) be considered rank, in which case the claim can be maintained only upon a grant or reservation within time of memory.

It has been doubted whether a sum certain is not necessary upon a grant or reservation of toll; but the contrary was held by three justices against one in the case of *Corporation of Maidenhead* (2), and in the case of *Wright* v. *Brewster* (3), where, upon a motion to enter the verdict for the defendant after a trial at Hertford before Lord Tenterden, a toll was claimed of a penny on the sale of a pig in a market, and it appeared that the amount of toll had not been uniform during the period of sixty years to which the evidence extended; but at one time 6*d.* per score, at another 4*d.*, and latterly 1*d.* each had been taken on the sale of pigs. Taunton, J., during the argument, expressed an opinion that under a grant of reasonable toll, or under a prescription

(1) See par. 4a, ante, p. 530, n. (1).

(2) Palm. at p. 86.

(3) K. B. Nov. 5th 1832; Gunning on Tolls, 62—63.

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which supposes such a grant, the amount might vary from time to time according to the varying value of money, and the Court sustained the verdict, establishing the claim to toll, on the ground that the Court could not take upon itself to say that the amount of the toll was unreasonable. This case determines that a toll reasonable in amount, but varying from time to time according to the value of money, is valid in point of law.

So in *Shephard* v. *Payne* (1), where a fee was claimed by the registrar of the court of the archdeacon, which had been immemorially taken, but had varied considerably from time to time in amount, it was held by the Court of Common Pleas that the claim to the fee might be sustained, if of reasonable amount; Willes, J., in delivering the judgment of the Court, observing, "a fee need not necessarily be of a fixed and ascertained, but may be of a reasonable amount." And this doctrine is affirmed by the same court in the case of *Mills* v. *The Mayor of Colchester* (2), and the decision in *Shephard* v. *Payne* (1) approved and held to be supported by many authorities: 1 Blackstone's Commentaries, 78; Com. Dig. Toll (E.); *Drake* v. *Wiglesworth* (3); *Gard* v. *Callard* (4); *Ballard* v. *Gerard* (5); and *Fuller* v. *Say.* (6)

If, therefore, this toll be claimed as immemorial, and the objection of rankness could be held to apply by reason of the amount of 1*s.*, it is an answer to that objection, that the claim is to a reasonable toll only, and that the amount may vary from time to time with the value of money. But the claim may also be sustained as to a toll granted or reserved within time of memory, on the ground that, upon the facts stated, we may presume a dedication by the Crown between the time of Henry III. and Charles I. of the streets and ways within the town to the public, which would constitute a good consideration for a grant or reservation of the tolls now claimed.

It has also been argued that this toll is bad, as being a toll for the mere use of a public way; but my Brother Willes has justly observed that this is not a toll for passing and repassing, but that it imports a licence to rest and stay upon the land for the

(1) 12 C. B. (N.S.) 433; 31 L. J. (C.P.) 297.
(2) Law Rep. 2 C. P. 476, 484.
(3) Willes, 654.
(4) 6 M. & S. 69.
(5) Ca. temp. Holt, 596.
(6) Willes, 631, n.

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purpose of selling marketable commodities; and is analogous to the decision in *Ellis* v. *Mayor of Bridgnorth* (1); and that the spot upon which the articles are exposed for sale in effect becomes part of the market.

The judgment, therefore, of the Queen's Bench, which appears to have been delivered without reasons assigned, upon the authority of the decision in *Bryant* v. *Foot* (2), must be reversed, and judgment entered for the plaintiff.

Judgment reversed. (3)

Attorneys for plaintiff: *Aldridge, Bromley, & Co.*
Attorney for defendant: *T. W. Burr.*

(1) 15 C. B. (N.S.) 52; 32 L. J. (C.P.) 273.

(2) Law Rep. 2 Q. B. 184, n.

(3) See the preceding case.

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXI VICTORIA.

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May 22.

FLEET, ADMINISTRATRIX OF MARY ANN ROSS, *v.* PERRINS.

Action—Husband and Wife—Chose in Action of Wife—Evidence—Admissibility against a Party to a Suit of Examined Copy of Answers to Interrogatories made by him in a former Suit.

The defendant received money from a third person to be appropriated to the use of a married woman, and he wrote telling her he held the money at her disposal. The husband survived the wife, and died, never having at any time interfered in any way as to the money:—

Held, that the wife's representative, and not the husband's, was the proper party to sue for the money; as the facts shewed a chose in action conferred on the wife with which the husband had not interfered during coverture.

An examined copy of answers to interrogatories made in a former suit by one of the parties to an action is admissible in evidence against him, without putting in the interrogatories to which they are answers, or proving the party's signature to the original answers.

DECLARATION by the plaintiff, as administratrix of Mary Ann Ross, deceased, for money had and received by the defendant to the use of M. A. Ross, and for money due on accounts stated between them.

Pleas: 1. Never indebted. 2. Payment.

At the trial before Lush, J., at the sittings in Middlesex during Trinity Term, 1867, it appeared that the action was brought by the plaintiff, as administratrix of Mary Ann Ross, the wife of Thomas R. Ross, both deceased. They were married in 1864, and went to India together; the wife died in December, 1864, and the husband in 1866. Letters from the defendant to M. A. Ross were put in evidence, of which the following extract is material:—

"Nov. 10, 1864.

"I received your letter yesterday, and write by return of post on account of your wishing me to send you the money; you will receive my letter sent by last week's mail, where I state that I have received your money and put it at interest at 7 per cent., but if you wish me to send it you after you know what the banks give here I will do so. . . . ."

An office copy of answers to interrogatories administered in a former action, since discontinued, in which the plaintiff, as administratrix of T. R. Ross, had sued the defendant for the same money, was tendered in evidence; and a witness proved that he had examined it with the original answers, but he was unable to say whether the signature to them was in the defendant's handwriting.

It was objected for the defendant that the answers were not admissible without putting in the interrogatories to which they were answers, and that the copy was not admissible without proving the signature of the defendant to the original answers.

The learned judge admitted the copy, subject to the objection.

The material answers were as follows:—

"2 and 3. To the 2nd and 3rd interrogatories, I say that after the marriage of T. R. and Annie Ross, and in the month of October, 1864, and before the death of Annie Ross, I received from Henry Gardner a sum of money, out of which he requested and authorized me to apply on his account for the benefit of Annie Ross 150*l.*, and the balance he paid to me on my own account. And out of this 150*l.* I did apply 30*l.* 17*s.* 10½*d.* by paying a bill for goods supplied to Annie Ross. And I received no other such sum from Henry Gardner, or any other person; and I have not at any time received any sum of money on account of T. R. Ross from any person."

"6. To the 6th interrogatory, I say that I deposited the 150*l.*

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in the City Bank, and that I afterwards at the request and direction of the said H. Gardner, repaid the money to him, less the 30*l.* 17*s.* 10½*d.*"

It was objected for the defendant that, the money being the gift of Gardner to M. A. Ross, he might countermand the authority before it was paid over to her: but the learned judge ruled that Gardner could not do so after the defendant had attorned to the donee.

It was then objected that the money at once became the property of T. R. Ross, and the action ought to have been brought by his representative.

The learned judge directed a nonsuit, with leave to the plaintiff to move to enter it for 119*l.* 2*s.* 1*d.*, subject to the defendant's objections, all questions of fact that might arise to be decided by the judge, and the Court to have power of a judge at nisi prius to amend.

A rule having been obtained accordingly,

May 6. *Prentice, Q.C.*, and *Gorst*, shewed cause. This money was received by the defendant for the use of the wife during marriage, and became at once the property of the husband, and as he survived, his representatives ought to sue. In 1 Williams on Executors, 6th ed. p. 816, the case of *Huntley* v. *Griffith* (1), is cited for the proposition, that where a legacy was left to a femme sole who afterwards married, and then the husband and wife gave a letter of attorney to another to receive the money, and he received it, and afterwards the wife died, and then the husband, the action is well brought by the husband's administrator, because the receipt changed the property to the husband alone. *Bird* v. *Peagrum* (2) is a strong authority for the defendant. There leasehold property had on the marriage been conveyed by the wife, with the consent of her intended husband, to trustees, in trust to pay to or permit her to receive the rents to her separate use, and she had deposited some of the rents which she had received with the defendant, and it was held that on the wife's death her husband could maintain an action for the money in his own right. That case is not distinguishable from the present. [They also cited on this point *Mes-*

(1) Moore, 452; Goulsb. 158, pl. 91. (2) 13 C. B. 639; 22 L. J. (C.P.) 166.

senger v. *Clarke* (1); *Bidgood* v. *Way* (2); *Molony* v. *Kennedy* (3); Bac. Ab. Baron and Feme (D); *King* v. *Basingham.* (4)]

[BLACKBURN, J., referred to *Philliskirk* v. *Pluckwell* (5), cited by Parke, B., in *Gaters* v. *Madeley.* (6)]

Secondly: The answers to the interrogatories were not admissible in evidence without also putting in the interrogatories, on the same principle as an answer to a bill is not admissible without the bill: *Pennell* v. *Mayer.* (7)

[LUSH, J. A letter from the defendant beginning "in answer to your letter," would be admissible against the defendant, without the letter to which it was an answer, though the defendant might, no doubt, put in the letter.]

Assuming that the answers, if properly proved, might have been put in, it was necessary to prove the defendant's signature to the originals. In *Barnes* v. *Parker* (8), Martin, B., refused to admit an office copy of an affidavit, purporting to be that of the defendant, and filed in the Exchequer, without proof of the defendant's signature to the original.

Marshall Griffiths, in support of the rule, was directed by the Court to confine his argument to the first point. The money was never in the actual possession of the wife, but only held by the defendant at the wife's disposal, and it amounted in effect to a mere contract or chose in action, and the husband having in no way interfered during his life, the right to recover the money would have survived to the wife, and so is in her representatives. In 1 Williams on Executors, 6th ed. pp. 797, 798, it is laid down as settled law, upon the authority of *Gaters* v. *Madeley* (9), affirmed by subsequent cases, that if there be a chose in action made to the wife during coverture, the husband may sue alone upon it, or permit his wife to take an interest in it, in which latter case it stands on the same footing as if made to the wife before coverture. *Betts* v. *Kimpton* (10) is also a strong authority to the same effect.

Cur. adv. vult.

(1) 5 Ex. 388; 19 L. J. (Ex.) 306.
(2) 2 W. Bl. 1236.
(3) 10 Sim. 254.
(4) 8 Mod. 199.
(5) 2 M. & S. 393.
(6) 6 M. & W. at p. 426.
(7) 2 Mood. & Rob. 98.
(8) 15 L. T. (N. S.) 218.
(9) 6 M. & W. 423.
(10) 2 B. & Ad. 273.

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May 22. The judgment of the Court (Blackburn and Lush, JJ.) was delivered by

BLACKBURN, J. In this case the plaintiff, as administratrix of Thomas Ross, commenced an action against the defendant for money had and received to the use of Thomas Ross during his lifetime. In answer to interrogatories administered in that action, the defendant stated that she had received a sum of 119*l.* 2*s.* 1*d.*, to give to Thomas Ross's wife, but had never held it for his use. The husband had survived the wife. The plaintiff then discontinued that action, and commenced the present action as administratrix of the wife. At the trial, before my Brother Lush, letters from the defendant to the wife were produced, which were such as if addressed to a femme sole would beyond all doubt have shewn that the defendant promised her to hold some money, which defendant had received from a third party, at the wife's disposal, but not shewing the amount. There was no evidence that the husband in any way interfered either to allow his wife to have the control of this money, or to prevent her from dealing with it, nor whether he knew of its existence or not.

To prove the amount the plaintiff offered in evidence an examined copy of the defendant's answers to the interrogatories in the former action of *Fleet, Administratrix of Thomas Ross* v. *Perrins*. These were objected to, unless the interrogatories to which they were answers were also proved, and unless the defendant's handwriting to the original answers were also proved. The plaintiff was not prepared with evidence of either. My Brother Lush received the evidence, subject to the objection.

It was further objected that the cause of action did not survive to the wife, and that the action was misconceived.

My Brother Lush directed a nonsuit, with leave to move to enter a verdict for 119*l.* 2*s.* 1*d.*

A rule having been obtained, it was argued last term before my Brother Lush and myself.

We were, on the argument, clearly of opinion that the evidence was properly received. According to the decision in *Richards* v. *Morgan* (1), a party using in a suit the deposition of a third person makes that deposition evidence against himself for all the world,

(1) 4 B. & S. 641; 33 L. J. (Q.B.) 114. 10 Jur. N.S. 539.

as the using of it is an admission by conduct that its contents are true. A multo fortiori, the deposition, purporting to be by the defendant herself, and used against the present plaintiff in another action, is admissible without further proof than that it was used by the defendant in that action. And we think, that, though the defendant was undoubtedly entitled to put in the interrogatories, and require them to be read as explanatory of the admission,—just as if part of a conversation had been given in evidence the defendant might, on cross-examination, or by independent evidence, prove the rest of the conversation, or if a letter, purporting to be part of a correspondence, were given in evidence, he might give in evidence the other letters to explain it,—yet the not producing the interrogatories did not render the answers inadmissible in evidence, but was only matter of remark, of more or less force, that the evidence not produced might have altered the nature of the apparent admission. In a case like the present, where the answers were quite intelligible by themselves, that remark would have no effect whatever.

We took time to consider the effect of the cases, as to whether, on this evidence, the action could properly be brought by the wife's representative, or should have been brought by the husband's representative. There is no doubt that all personal property of a corporeal nature, such as goods, or cash, belonging to the wife before marriage, vests in the husband by the marriage, and that all such property given to or acquired by the wife after marriage also vests in the husband. But choses in action belonging to the wife before marriage do not vest in the husband unless he does some act to reduce them into possession during the coverture, and even during coverture the husband may permit the wife to make a contract, in an action on which he *may* join with her during her life, though he may disaffirm her interest and sue on the contract as made with himself alone. If he does permit the wife to make such a contract, and does not reduce it into possession during the coverture, it survives to the wife. The earlier cases illustrating this rule are cases of written contracts, such as bonds and promissory notes given to the wife, or to the husband and wife during coverture. As to those, the rule of law is stated in 1 Williams on Executors, 798, to be fully settled, that "if there be a bill or note

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made to a married woman during coverture, the husband may sue alone upon it, *or permit his wife to take an interest in it*, in which latter case it appears to stand on the same footing as if it had been made to her before coverture." Except from the difficulty of shewing that the contract was in fact made with the wife, we see no reason why the rule of law should be different in this respect in cases of a contract in writing and any other, and we think that the decision in *Dalton* v. *The Midland Railway Company* (1) fully bears out what is said by Sir E. V. Williams, in the last edition of his valuable work on Executors, vol. 1, p. 794, that "it may be stated generally that a married woman, though incapable of making a contract, is capable of having a chose in action conferred on her, which will survive to her on the death of her husband, unless he shall have interfered by doing some act to reduce it into possession."

We were much, and properly, pressed on the argument with the case of *Bird* v. *Peagrum* (2), which was decided by some of the same judges, and within a fortnight after the decision in *Dalton* v. *The Midland Railway Company* (1), and which therefore must certainly have been supposed by them to be consistent with their former decision, though some of the expressions reported to have been used by Jervis, C.J., in the later case are not very consistent with the language used in the considered judgment delivered in the earlier case. We think, however, that in the present case the facts shew that there was a chose in action conferred on the wife with which the husband did not during coverture interfere. The money did not according to the rule in *Williams* v. *Everett* (3) become the money of the person on whose behalf it was remitted until the depositee had by some act attorned to that person, up to which time it remained the money of the remittor. The money here was remitted for the use of the wife, and of her alone; and the letters of the defendant attorning to the remittee were addressed to the wife alone, and were promises to her to hold the money at her disposal; and there never was anything done to vest either in the husband or the wife any property in any coin as a personal chattel, so that it remained a mere chose in action in the wife, with which the husband did not interfere.

(1) 13 C. B. 474; 22 L. J. (C.P.) 177. (2) 13 C. B. 639; 22 L. J. (C.P.) 166.
(3) 14 East, 582.

We think therefore that the rule to enter the verdict for the plaintiff must be made absolute.

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Rule absolute.

Attorney for plaintiff: *Titt.*

Attorneys for defendant: *Boulton & Sons.*

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May 28.

Attorney—Misconduct—Striking off Roll.

An attorney, acting as clerk to a firm of attorneys, in completing the sale of certain property, received the balance of the purchase-money, which he appropriated to his own use. On an application to strike him off the roll, he admitted the misappropriation:—

Held, that although the misconduct was not committed strictly in his professional character, yet, as it was misconduct which would have prevented him from being admitted as an attorney, the Court would exercise its summary jurisdiction, and punish the misconduct; and they suspended him for twelve months accordingly.

RULE calling upon Robert Raby Hill to shew cause why he should not be struck off the roll of attorneys of this Court.

It appeared from the affidavits that Hill, who was an admitted attorney, was engaged by Messrs. Hargrove, Fowler, & Blunt as their clerk at a fixed salary, and continued in their employ from October, 1863, to April, 1865. Since 1865 Hill had been in practice at Ipswich as an attorney.

In March, 1865, Hill, acting as the clerk of Hargrove, Fowler, & Blunt, completed the sale of certain property by one Webster, who had instructed Messrs. Hargrove to place the purchase-money received by them to the credit of his account.

In February, 1866, in settling with Webster their cash account, Messrs. Hargrove discovered that Hill had received from Mr. Marchant, a solicitor at Deptford, who acted for Mr. Fleming, the purchaser of the property, the sum of 85*l.*, being the balance of the purchase-money to be paid by the purchaser, and had never accounted to Messrs. Hargrove for the same.

Hill, in his affidavit, admitted having appropriated to his own use the 85*l.* under great pecuniary pressure, and also admitted having

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received a sum of 8*l.* 14*s.* belonging to Messrs. Hargrove, which he had also misappropriated. Hill, since the discovery of the fraud, had offered to pay Messrs. Hargrove the amount of the money misappropriated, and had paid it. Affidavits were made as to the propriety of his conduct since 1865.

Holl shewed cause. He admitted that Hill had been guilty of misconduct, and appealed to the merciful consideration of the Court.

[COCKBURN, C.J. The misconduct was committed by Hill as clerk, not as an attorney. Although he was an attorney at the time, he was acting as an attorney's clerk. Is there any authority for saying that in such a case, without a conviction, the Court has interfered?]

Murray, in support of the rule. In *Re Blake* (1) it is laid down that the question is not whether the person has been guilty of misconduct as an attorney, but whether he has been guilty of misconduct which would render him unfit to be an attorney. In that case there was no relation of attorney and client. If Hill had misappropriated money before he had been admitted, it would have been good ground for not putting him on the roll. In *Re Blake* (2) Cockburn, C.J., says: "I am of opinion that Blake is amenable to the summary jurisdiction of this Court, although the misconduct of which he has been guilty did not arise in a matter strictly between attorney and client, but out of a simple loan transaction. I proceed on the general ground that where an attorney is shewn to have been guilty of gross fraud, although the fraud is neither such as renders him liable to an indictment, nor was committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, this Court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers."

The Court then called upon

Holl. In general the Court will not, where the misconduct charged amounts to a crime, strike an attorney off the roll on affidavits. The act done by Blake in *Re Blake* (3) was done by

(1) 3 E. & E. 34; 30 L. J. (Q.B.) 32.
(2) 3 E. & E. at p. 37; 30 L. J. (Q.B.) at p. 34.
(3) 3 E. & E. at p. 40; 30 L. J. (Q.B.) at p. 35.

him in his character of attorney, and it was on this ground that the Court proceeded in that case. Crompton, J., cites a passage from Chitty's Archbold's Practice, 11th ed., p. 146: "The Court will, in general, interfere in this summary way, and strike an attorney off the roll, or otherwise punish him, for gross misconduct not only in cases where the misconduct has arisen in the course of the suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or entrusted with it in consequence of that character." In that case no doubt Blake was entrusted with the deed, of which he had made fraudulent use, because of his character of attorney; and Crompton, J., goes on to say: "In the present case I cannot say that Blake's fraud was not committed in a matter connected with his professional character. If he did not act in it as an attorney, he, at all events, took advantage of his professional position to deceive." That is not the case here.

COCKBURN, C.J. No case has, so far as I am aware, come before the Court under the precise circumstances under which this case presents itself, namely, of an act of delinquency committed by an attorney's clerk, who at the same time is an attorney, though at that time not acting as such; but still I think, on every principle of justice, we ought not the less to entertain the application. In dealing with the case, I am perfectly prepared to abide by what I said in *Re Blake.* (1) When an attorney does that which involves dishonesty, it is for the interest of the suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as attorney of the court. In this case, if the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement; and upon that conviction being brought before us, we should have been bound to act. If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the Court should not interfere until the conviction had taken place; but here we have the person against whom this application is made admitting the facts. It appears that he, being a clerk in the

(1) 3 E. & E. 34; 30 L. J. (Q.B.) 32.

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employment of Messrs. Hargrove, received a sum of money on their account, and he embezzled it; that is conduct of which, although he was not acting in the character of an attorney, yet being an attorney, the Court is bound to take notice. There are, however, in the case, circumstances of mitigation. It appears that shortly after this transaction, which is the subject-matter of the present application, he left the employment of the gentlemen in whose service he had been, and set up business for himself at Ipswich, and that an interval of three years has since elapsed, and during the whole of that time he has behaved himself with perfect propriety in his character of attorney in the various transactions in which he has been engaged; and that may fairly, I think, entitle us to draw the inference that he did act in this transaction under the influence of great pressure, and that it was an exception to the ordinary course of his conduct, and that he has entirely abstained from anything similar since. There is the fact, also, that he has paid these sums. Then, on the other hand, it is to be observed, that the repayment, when it took place, was upon the discovery of the fraud. If he had spontaneously come forward and acknowledged the truth, and of his own accord had made good the loss his employers had sustained through the embezzlement in question, I think that would have entitled him to much more favourable consideration than the mere fact of his payment upon the facts being discovered. We may, therefore, ascribe the payment of the money to the desire to protect himself from the consequence of his misconduct, rather than to any contrition on his part and desire to make good the mischief he had done. Still, the other circumstances are to be taken into consideration. I think, upon all the facts of the case, we are not called upon to go to the extent of striking him off the roll; but we cannot pass the case over without marking our sense of the misconduct in this instance admitted to have taken place. The least we can do is to say that he must be suspended from practising as an attorney for twelve months.

I should add, there is one consideration I omitted, and which, I think, is entitled to great weight. It is that put to us in the course of the discussion, namely, that if these facts had been brought to our knowledge upon the application for this gentleman's admission, we might have refused to admit him; and I

think the fact of his having been admitted does not alter his position; having been admitted, we must deal with him as if he were now applying for admission; and as in the case of a person applying for admission as an attorney, we should have considered all the circumstances, and either have refused to admit, or have suspended the admission for a certain time, so where a person has once been admitted we are bound, although he was not acting in the precise character of an attorney, to take notice of his misconduct.

BLACKBURN, J. I am of the same opinion. I think when we are called upon, in exercise of our equitable jurisdiction, to order an attorney to perform a contract, to pay money, or to fulfil an undertaking, there we have jurisdiction only if the undertaking or the contract is made in his character of attorney, or so connected with his character of attorney as to bring it within the power of the Court to require that their officer should behave well as an officer. But where there is a matter which would subject the person in question to a criminal proceeding, in my opinion, a different principle must be applied. We are to see that the officers of the court are proper persons to be trusted by the Court with regard to the interests of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them, upon the same principle as if we were considering whether or not a person is fit to become an attorney. If he has previously misconducted himself we should consider whether the circumstances were such as to prevent his being admitted, or whether he had condoned his offence by his subsequent good conduct. The principle on which the Court acts being to see that the suitors are not exposed to improper officers of the court. In the present case I adhere to what I think is the effect of *Re Blake* (1), that although the misconduct is not directly or incidentally connected with his character of attorney, still we must consider what effect that has upon the question of a proper person to be an officer of the court. As to the circumstances in mitigation, it has weighed with me that during the three years that he has been practising as an attorney, Hill has conducted himself well and done nothing wrong,

(1) 3 E. & E. 34; 30 L. J. (Q.B.) 32.

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and as he has conducted himself well during that time, although as to this offence, there is nothing to make me believe that he made amends voluntarily, still we may consider it a solitary offence.

I may add, in accordance with what the Lord Chief Justice has said, that in the punishment that it would be necessary to impose upon an offender for the protection of the suitors, it always should be considered whether the particular wrong done is connected with the character of an attorney. The offence morally may not be greater, but still, if done in the character of an attorney, it is more dangerous to the suitors, and should be more severely marked. I agree that where it is denied that a criminal offence has been committed, the Court ought not to decide on affidavits a question which ought to be tried before a jury.

MELLOR, J. I am of the same opinion. I wish merely to say that I entirely concur in the last observation that the Lord Chief Justice has made; it would be extremely dangerous if we were to allow an immunity because the man, when the offence was done, was not acting as an attorney but as clerk. It would be inexpedient to allow a person to escape punishment on the ground that the act complained of was done by him as clerk and not as attorney, and we are entirely justified in interfering. I agree that a suspension for one year is sufficient to satisfy the justice of the case.

LUSH, J. I am of the same opinion. I think where the misconduct is of such a character as would prevent a person from being admitted as an attorney, that we are bound to interfere after a person has been admitted as an attorney.

Rule absolute accordingly.

Attorney for Incorporated Law Society: *E. W. Williamson.*
Attorney for Hill: *Dutton.*

BUXTON *v.* THE NORTH EASTERN RAILWAY COMPANY.

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June 16.

Negligence—Railway Company—Fences, duty to repair—8 *Vict. c.* 20, *s.* 68—*Carriers by Railway, Liability of beyond their own Line.*

The plaintiff was a passenger by the defendants' railway, to be carried from Y. to T. To reach T. it was necessary to travel over a line belonging to another company; while passing over the latter line, the train in which the plaintiff was came into collision with a bullock, which had strayed on to the line from an adjoining field by breaking through the fence. The fence was in fact defective, but had been lately repaired, and was apparently in good condition. The plaintiff being injured by the collision, sought to recover damages from the defendants:—

Held, on the authority of *Great Western Railway Company* v. *Blake* (7 H & N. 987; 31 L. J. (Ex.) 346), that, the contract having been made with the defendants, they were the proper parties to be sued.

Held also, that 8 Vict. c. 20, s. 68, imposes no duty on a railway company towards their passengers to keep up the fences; and that a railway company are not bound, at common law, to maintain fences sufficient to keep cattle off the line under all circumstances, but are bound to use every reasonable care to prevent them straying on to the line.

DECLARATION, that the plaintiff was a passenger of the defendants, to be safely and securely carried and conveyed upon certain railways, à certain journey from York to Tamworth, for reward to the defendants; that it was the duty of the defendants to use due and proper care and skill in and about managing the said railways and trains thereon, and in and about the safely and securely carrying and conveying the plaintiff the said journey; yet the defendants did not use proper care and skill in and about the managing of the railways and trains thereon, or in and about the carrying and conveying the plaintiff the said journey; but so negligently conducted themselves therein that the train by which the plaintiff was passenger ran against a certain bullock then upon the railway, and certain carriages in the train were thrown off the rails and broken, and the plaintiff was hurt, alleging special damage.

Plea: Not guilty.

At the trial before Kelly, C.B., at the spring assizes for Staffordshire, it was proved that the plaintiff took a ticket as a second-class passenger by the North Eastern Railway from York, on that line, (viâ Derby) to Tamworth, on the Midland Railway. When within a mile of a station called Eckington, on the Midland line, the train

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came into collision with a bullock which was on the line between the rails, and the plaintiff was injured. The bullock, with others, had been put into a field adjoining the railway. The field was separated from the railway by a quick-set hedge, and posts and rails. The bullock tempted by better pasture on the other side of the line forced his way through the hedge, and pressing with his weight against the rails broke down a post, and so got on the line. The post was decayed at a part which was below the ground, but the decay was not visible, and to all outward appearance the post was sound. It was broken off at the part at which it entered the ground. The Midland Company had, from time to time, renewed the posts and rails in the field, and no complaints had been made respecting the fences, and they believed them to be in good order; a short time before the escape of the bullock from the field the post and rails had been examined and repaired.

It was objected by the defendants' counsel, that the accident having happened on the Midland line the obligation to fence was with the Midland Company and not with the defendants; that the defendants were bound only to take reasonable care, and that there was no warranty or undertaking on the part of the defendants that the fences should under all circumstances be effective, however severely they might be tested; and that there was no evidence of negligence against the defendants.

The Chief Baron overruled the objection, but gave the defendants leave to move to enter a nonsuit; and he told the jury that the law had wisely imposed on a railway company an obligation not only to construct, but to maintain at all times while the railway was in operation, all fences whatsoever that are necessary to separate the railway from the adjoining fields in which cattle may be found, so as effectually to prevent them from escaping from the adjoining fields on to the railway. The Chief Baron then read to the jury s. 68 of 8 Vict. c. 20 (1); and continued, the question for

(1) 8 Vict. c. 20, s. 68:—"The company shall make, and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railways; . . . . . also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners and occupiers thereof from straying thereout by reason of the rail-

them was whether the railway company had adequately discharged their duty; in other words, whether they had kept and maintained the fence in question in a proper and sufficient condition to prevent the escape of cattle on to the line at the time or just before the time when the mischief occurred. If there was a mad bull in a field unrestrained by any ordinary mode of restraint, that would not be a case that would come within the operation of this act of parliament or within the scope of the duty of the railway company. The Chief Baron then pointed out the condition in which the posts and rails were, and asked was that a condition of things in which the railway company could be said to have complied with the obligation imposed upon them by this act of parliament to keep up this fence? If the jury thought that the post, although it failed to keep in the bullock, was in such a state that no negligence could be charged against the company, and that there was, in fact, a performance of the duty imposed upon them by the act of parliament, they must find a verdict for the defendants, but if they thought the fence was not in a proper condition, it being the duty of the company to maintain it in a proper condition, then they should find for the plaintiff.

The jury found a verdict for the plaintiff for 800*l*.

A rule was obtained to enter a nonsuit, on the ground that there was no evidence of negligence in the defendants, which ought to have been left to the jury; or for a new trial on the ground of misdirection in the Chief Baron having directed the jury that it was negligence in the defendants if the fences proved insufficient, and that the breach of the statutory obligation to maintain fences was evidence of negligence.

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way, together with all necessary gates, made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts and rails and other fences shall be made forthwith after the taking of any such land, if the owners thereof shall so require, and the said other works as soon as conveniently may be. . . .

. . . . . .

Provided always, that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using the railway; nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

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Huddleston, Q.C., Griffits, and *G. Browne,* shewed cause. First, the defendants are liable for the negligence of the Midland Company, they are bound to keep the line over which they contract to carry their passengers in a safe condition: *Great Western Railway Company* v. *Blake.* (1) Secondly, there is an obligation imposed upon railway companies, under s. 68 of 8 Vict. c. 20, and it is to maintain a fence which will prevent the escape of cattle from the adjoining land, so that the line shall be always free from cattle. Thirdly, their duty with regard to fences at common law, irrespective of any statute, is to have them in such good condition as shall protect the public while travelling. Between the adjoining owners and the company there is a warranty to keep the fences in repair, and the contract between the company and the passenger is to carry him over a line the fences of which shall be in order. They are bound to furnish the passenger with a roadworthy carriage on a roadworthy line: *Readhead* v. *Midland Railway Company.* (2)

[BLACKBURN, J. The proviso at the end of s. 68 shews it is an enactment for the benefit of the adjoining owners only, because if they choose to receive compensation the company are not bound to fence.]

Matthews, Q.C., and *H. James,* in support of the rule. It must be conceded that *Great Western Railway Company* v. *Blake* (1) is in point as to the defendants being in the same position as if the accident had occurred on their own line. On the other point there is a misdirection. As between the Midland Company and the owners of the adjoining lands, no doubt there is an absolute obligation to keep the fences in repair, but there is no such obligation between a railway company and their passenger; to render them liable to a passenger for an accident caused through defect of fences, it must be shewn that the company were guilty of negligence. The obligation to fence is imposed by s. 68 of 8 Vict. c. 20, and does not extend beyond the owners or occupiers of the adjoining close: *Ricketts* v. *East and West India Docks* (3); *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Wallis.* (4)

BLACKBURN, J. The first question raised in this case is settled

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(2) Law Rep. 2 Q. B. 412.
(3) 12 C. B. 160; 21 L. J. (C.P.) 201.
(4) 14 C. B. 213; 23 L. J. (C.P.) 85.

by *Great Western Railway Company* v. *Blake*. (1) That case decides that where a railway company contracts with a passenger to carry him from one terminus to another, and on the journey the train has to pass over the line of another railway company, the company issuing the ticket incurs the same responsibility as that other company, over whose line the train runs, and by whose default the accident happens, would incur if the contract to carry had been entered into with them. That, being a decision of the Exchequer Chamber, is binding on this Court. That disposes of the question of entering the nonsuit.

The next point to be considered is, whether the Chief Baron mis-directed the jury in laying down that under the Railway Clauses Consolidation Act, 8 Vict. c. 20, s. 68, an absolute obligation to make and keep a good fence along the line is imposed on the company as between them and their passengers. It is clear that by s. 68 such an obligation is created with regard to the owners and occupiers of adjoining lands, but the proviso shews that the obligation is created with reference to owners and occupiers only; for it enacts that if a bargain be made with them, the company shall be freed from that liability. The obligation, therefore, as to their passengers, to fence, is not imposed on the company by that section; and it is consequently necessary to consider the nature and extent of the company's duty at common law. They are bound to take every reasonable care to prevent danger to their passengers from cattle coming on to the line in those places where it is probable that such an event may occur. The Chief Baron might have directed the jury that the Midland Railway Company were under an obligation to keep up a sufficient fence knowing that there were cattle in the field, and the jury might then have found that the Midland Company had been guilty of negligence in not keeping the cattle off their line, and this would have been a breach of duty for which the defendants would have been responsible. I think no objection could have been made to such a direction, and there would have been evidence to support a verdict in accordance with it. The question, however, was not left to the jury in that form. They were directed that the defendants must be taken to have warranted to the plaintiff that no

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346. 8 Jur. N.S. 1013.

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cattle should come on to the line. In my opinion, their liability does not extend so far. I do not think that the obligation to keep cattle from trespassing on the line is at all analogous to the obligation imposed upon a shipowner to have a seaworthy ship, or that imposed on a railway company—supposing that it really exists—to start a roadworthy carriage, and to keep their line in voyage-worthy repair. In this case the company were bound merely to take reasonable care that the cattle did not stray on to the line. I therefore come to the conclusion that this point not having been left to the jury there ought to be a new trial, but as it is a doubtful point, I think the plaintiff ought to have leave to appeal.

LUSH, J. I am of the same opinion. I think the first point is concluded by *Great Western Railway Company* v. *Blake* (1), and if there were not that case I should, nevertheless, hold that a company undertaking to carry passengers over another line is answerable for negligence happening on it just as much as if it happened on their own line. I, therefore, think that the Chief Baron was right in declining to nonsuit. It remains to consider whether his direction was correct. It is clear that he stated to the jury that if the company did not comply with the provisions of s. 68, they were guilty of a breach of duty towards the passengers. I think the Chief Baron was mistaken, and that the obligation imposed by s. 68 has nothing to do with the duty of a railway company towards their passengers; it exists solely between a railway company and the owners and occupiers of the adjoining lands. If the fence is not sufficient, and in consequence the cattle in the adjoining fields stray on to the line and are killed, the company are answerable to the owners whether they are guilty of negligence or not. The obligation towards the passengers results from their undertaking to carry, and consists in taking all due care that no accident shall happen. And even if the adjoining owner, by an arrangement has taken upon himself the obligation to fence, and erects a fence which is insufficient, if the want of a proper fence makes the railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjoining owner. In

(1) 31 L. J. (Ex.) 346; 7 H. & N. 987.

such a case as the present, the proper question for the jury is, whether the defendants have been guilty of a breach of their duty towards their passengers, that duty being to take all due care to prevent accidents. I therefore agree that there ought to be a new trial, but I think that the plaintiff ought to have an opportunity of appealing from our decision.

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Rule absolute accordingly. (1)

Attorney for plaintiff: *W. Edwards Wood.*
Attorneys for defendant: *Beale & Co.*

READ *v.* THE GREAT EASTERN RAILWAY COMPANY.

June 25.

Railway—Negligence—Passenger, Death of—Accord and Satisfaction—Action, fresh cause of—9 & 10 *Vict. c.* 93, *ss.* 1, 2.

Declaration by the plaintiff as widow of D. Read, under 9 & 10 Vict. c. 93, and 27 & 28 Vict. c. 95, against a railway company for negligence whereby D. Read, a passenger, was injured, of which injuries he died. Plea, that in the lifetime of D. Read, the defendants paid him, and he accepted, a sum of money in full satisfaction and discharge of all the claims and causes of action he had against the defendants. Demurrer, on the ground that the accord and satisfaction with D. Read was no accord and satisfaction of the claim arising from his death:—

Held, that the cause of action was the defendants' negligence, which had been satisfied in the deceased's lifetime, and that the death of D. Read did not create a fresh cause of action.

DECLARATION, that the defendants were possessed of and had the management of a railway, and of railway trains and locomotive engines thereon, and were carriers of passengers for hire on and along the railway; that D. Read had become and was a passenger of the defendants, to be by them as such carriers safely and securely carried and conveyed, in and along the railway, in and by means of a railway train of the defendants, on a certain journey, for reward to the defendants in that behalf. Yet the defendants so carelessly and negligently, and improperly conducted themselves in and about the carrying D. Read on the journey, and in and about the management of the railway trains and engines whilst D. Read was such passenger, that by means of the careless-

(1) The plaintiff did not appeal, the parties having come to terms.

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ness, negligence, and improper conduct of the defendants, the railway train of the defendants ran against and into the train in which D. Read was such passenger, and D. Read was thrown out and greatly injured, of which injuries he afterwards died; and the plaintiff was the wife of D. Read at the time of his death, and that there is neither executor nor administrator to D. Read, and claiming damages. (1)

Plea, that in the lifetime of D. Read, and after the committing of all the wrongs and breaches of duty in the declaration alleged, the defendants paid to D. Read, and he assented to and received from them a sum of money in full satisfaction and discharge of all the claims and causes of action which D. Read had against the defendants in respect of the breaches of duty and other causes of action complained of.

Demurrer and joinder.

Codd, in support of the demurrer. The plea is bad. Satisfaction to the deceased is no bar to the present action. The question turns upon the construction to be put on s. 1 of 9 & 10 Vict. c. 93. (1) In *Blake* v. *Midland Railway Company* (2), Coleridge, J., in delivering the judgment of the Court, says—"Reliance was placed upon

(1) By 9 & 10 Vict. c. 93, s. 1, it is enacted, "that whensoever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; and although the death shall have been caused under such circumstances as amount in law to felony." Section 2:—"And every such action shall be for the benefit of the wife, husband, parent, and child, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

By 27 & 28 Vict. c. 95, s. 1, if there is no executor or administrator, the action may be brought by any of the persons for whose benefit the action would have been brought by an executor or administrator.

(2) 18 Q. B. at p. 109; 21 L. J. (Q.B.) at p. 237.

the first section which states in what cases the newly given action may be maintained, although death has ensued, the argument being that the party injured, if he had recovered, would have been entitled to a solatium, and, therefore, so shall his representatives on his death. But it will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles." So in *Pym* v. *Great Northern Railway Company* (1), Erle, C.J., in delivering the judgment of the Exchequer Chamber, says:— "The statute, as appears to me, gives to the personal representative a cause of action beyond that which the deceased would have had had he survived, and based on a different principle." These two cases shew that the executor after the death of the person injured has a new cause of action.

[LUSH, J. Suppose that the deceased had brought an action and recovered and then died, could his widow bring another action?]

She could. Under s. 1, whenever the death of a person is caused by a wrongful act, the representative under 9 & 10 Vict. c. 93, or the widow under 27 & 28 Vict. c. 95, can sue.

Philbrick, in support of the plea. It is clear that on demurrer, unless there is a new cause of action, the plea is a perfect accord. It is contended that a new and additional right of action is given by 9 & 10 Vict. c. 93, s. 1. But under s. 1 only one claim can be made in respect of the same wrongful act, whether such claim be made before or after the death of the wrongdoer. Before the passing of the statute if a person was injured, and died from the effects of the injury, no action could be maintained. A right of action is therefore extended to his executor, with a provision that the damages recovered by him shall be apportioned as pointed out in s. 2. The words "every *such* action" in that section mean such action as the deceased could have maintained. It is the breach of duty which is the cause of action. The supposed new cause of action can only arise from the wrongful act; and in the absence of express words giving two remedies for the same wrongful act the ordinary rule applies, and there can be no new cause of action after an accord and satisfaction.

Codd, in reply.

(1) 4 B. & S. at p. 406; 32 L. J. (Q.B.) at p. 379.

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BLACKBURN, J. I think the plea is a good plea. The question turns upon the construction of s. 1 of 9 & 10 Vict. c. 93. Before that statute the person who received a personal injury, and survived its consequences, could bring an action, and recover damages for the injury; but if he died from its effects, then no action could be brought. To meet this state of the law the 9 & 10 Vict. c. 93, was passed, and "whenever the death of a person is caused by a wrongful act, and the act is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable for an action for damages notwithstanding the death of the party injured." Here, taking the plea to be true, the party injured could not "maintain an action in respect thereof," because he had already received satisfaction. Then comes s. 2, which regulates the amount of damages, and provides for its apportionment in a manner different to that which would have been awarded to a man in his lifetime. This section may provide a new principle as to the assessment of damages, but it does not give any new right of action. Mr. Codd was driven to argue that the executor could bring a fresh action even if the deceased had recovered damages in an action; but to hold this would be to strain the words of the section. The intention of the enactment was that the death of the person injured should not free the wrongdoer from an action, and in those cases where the person injured could maintain an action his personal representative might sue.

LUSH, J. I am of the same opinion. The intention of the statute is, not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim actio personalis moritur cum personâ would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer. It is true that s. 2 provides a different mode of assessing the damages, but that does not give a fresh cause of action.

Judgment for the defendants.

Attorney for plaintiff: *Roberts.*
Attorney for defendants: *Shaw.*

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July 3.

Husband and Wife—Parent and Child—Liability of Father for Necessaries supplied to Child by order of Wife—2 & 3 Vict. c. 54, *s.* 1.

The plaintiff, on the order of the defendant's wife, supplied clothes for the defendant's child; the wife was living separate from him for reasons which justified her doing so, and the child, which was under seven years of age, was living with her, against the defendant's will, an order of the Master of the Rolls having been made, under 2 & 3 Vict. c. 54, giving the wife the custody. The wife had no means adequate to support her according to her husband's degree:—

Held, by Blackburn, Mellor, and Lush, JJ. (Cockburn, C.J., dissenting), that as the child was by law properly in the care of the wife, the reasonable expenses of providing for it were part of the reasonable expenses of the wife, for which she had authority to pledge her husband's credit.

ACTION for goods sold and delivered.

Plea: Never indebted.

The cause was tried in December, 1867, before the Secondary of London. The following were the notes of the trial:—

James Bennett Bazeley, plaintiff: I supplied clothes to a child of Mrs. Forder, by order of Mrs. Forder. My charges, 9*l.* 8s., are fair and reasonable charges.

Cross-examined: Did not know Mrs. Forder before the child came with Mrs. Forder. She gave a reference to a person in the Tower I knew well. Delivered part of clothes to Mrs. Forder, part at Eastgate Sterm, Winchester, not her husband's residence. I found the reference perfectly satisfactory, and family respectable. All the articles were for the child.

Elizabeth Forder, wife of William Forder, the defendant: In June, 1867, I ordered these goods of Mr. Bazeley. Differences existed between myself and my husband. An application was made to the Master of the Rolls for custody of the child (1); I have

(1) It was conceded that an order had been made by the Master of the Rolls, in opposition to the defendant, giving the wife the custody of the child, which was within the age of seven years, under 2 & 3 Vict. c. 54, s. 1, which enacts that "it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make an order for the access of the petitioner to

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no means of support from my husband. They were necessaries for the child; I had no means but to order for him. I was compelled to leave for adultery on part of my husband (objected to).

Cross-examined: I have an independence of 33*l.*, out of which I have payments to make. I have a clear 25*l.* per annum.

Upon this evidence I directed a nonsuit. Plaintiff's solicitor, however, refused to be nonsuited, whereupon defendant's counsel asked me to direct the jury to find a verdict for defendant.

I then told the jury I thought there was no evidence for them of any authority, expressed or implied, of the husband to the wife to pledge his credit, but the question for them was whether, as they had heard she was in receipt of 25*l.* per annum, they thought that a sufficient allowance, if not, they should find for the plaintiff, and I should give defendant leave to move the Court to enter the verdict for him.

The jury found a verdict for the plaintiff for 9*l.* 8*s.*, the amount claimed.

A rule having been obtained to enter a verdict for the defendant pursuant to the leave reserved, on the ground that there was no evidence to go to the jury,

Jan. 31. *Horace Lloyd* shewed cause. The necessary clothes for a child, rightfully in the custody of the mother, living apart from her husband owing to his misconduct, are as much necessaries suitable to her rank for which she is entitled to pledge her husband's credit as the livery or food of servants. The 2 & 3 Vict. c. 54, has made the infant children part of the wife's family. It may be said, there is no obligation on the mother to take the child, and so it is a mere voluntary act; but the same may be said of her own clothes; she has a right to pledge her husband's credit for clothes suitable to her husband's degree: *Houliston* v. *Smyth* (1); yet it is optional with her whether she will dress in cheaper articles or not.

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such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just."

(1) 3 Bing. 127.

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[LUSH, J. In *Rawlyns* v. *Vandyke* (1), Lord Eldon said it was a question for the jury whether a husband, living apart from his wife, and allowing the children to remain with her, did not constitute her his agent, and authorize her to contract debts for clothing and necessaries for them. But here it is against the defendant's will that the child remains with the wife.]

Keane, Q.C., and *Bruce Campbell*, in support of the rule. Nothing can be clearer than that the wife had only implied authority to pledge her husband's credit for necessaries for herself. There is no obligation on the part of the father to support his children at the common law, the liability is only by force of the statutes as to poor law. In *Urmston* v. *Newcomen* (2) it was held that the father was not liable for necessaries supplied to his infant child, unless, perhaps, if he had deserted it; but that is not the present case. So again in *Mortimore* v. *Wright* (3) Lord Abinger, C.B. expresses his desire that there should be no doubt on the subject. "In point of law, a father, who gives no authority and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be." In *Fluck* v. *Tollemache* (4) Burroughs, J., refused to leave the question of authority to the jury, there being no knowledge shewn on the part of the father that clothes had been supplied to his son. *Rawlyns* v. *Vandyke* (1) is the only semblance of authority for the defendant's liability; but that case has already been distinguished by the Court, on the ground that here the father is ready to support the child and it is against his will that it is left with the mother.

[BLACKBURN, J. The husband is liable for necessaries supplied on credit to the wife when living apart owing to his misconduct. The 2 & 3 Vict. c. 54, says, if the Court of Chancery thinks it right, she shall carry the children under seven years of age with her as part of her family. Does not this impliedly say that the husband shall be liable for necessaries for the children, just as he would be for necessaries for the wife?]

If the legislature had intended to impose this liability, it would have provided such an enactment for the purpose, as it has done

(1) 3 Esp. at p. 252.
(2) 4 Ad. & E. 899.
(3) 6 M. & W. 482, 486.
(4) 1 C. & P. 5.

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in similar cases. The wife can obtain a judicial separation and obtain a proper allowance.

[BLACKBURN, J. That argument goes too far, because it would equally apply to the case of necessaries for the wife herself.]

Cur. adv. vult.

July 3. The following judgments were delivered:—

BLACKBURN, J. The judgment I am about to deliver is that of my Brothers Mellor and Lush, and myself.

In this case the plaintiff obtained a verdict for a small sum, subject to leave to enter a verdict for the defendant if there was no evidence proper to be left to the jury.

It appears by the secondary's notes that the plaintiff by order of the defendant's wife supplied clothes for the defendant's child; but it also appears that the wife was living separate from the defendant, and that the child who was under seven years of age was residing with her against the defendant's will, the Master of the Rolls having, in exercise of the powers conferred on him by the 2 & 3 Vict. c. 54, made an order that the infant should be in her custody. There was some evidence that the defendant's wife had been driven from him by his misconduct. In justice to the defendant's character it should be observed that it was very slight, and that it is not improbable that, if the pecuniary demand had been so large as to make it worth his while to undertake the odious task, he might have shown that the separation was voluntary on the wife's part; but we have only to consider whether there was any evidence for the jury. There was some evidence that the wife had some separate property, but the jury found (and on the evidence were justified in finding) that it was inadequate to support the wife according to her husband's degree.

A wife, when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses, according to her husband's degree, unless she is in some other way supplied with the means of providing them. If, therefore, the plaintiff's claim here had been for reasonable apparel supplied to the wife herself, or for the supply of food for

her household servants, such as according to her husband's degree would be reasonable, there was evidence sufficient to be left to the jury in support of his claim to charge the husband. And the only question remaining is, whether, the wife having the custody of the infant, against the husband's will, but by force of an order made under the statute, the reasonable expenses incurred in providing for the infant are part of the wife's reasonable expenses within the meaning of the rule of law. If they are, there was evidence that the defendant's wife was separated from the defendant under such circumstances as gave her, by law, authority to pledge her husband's credit for them, and the verdict must stand; if they are not, I do not see any legal principle on which the defendant can be made liable.

There is, I believe, no authority or case bearing on the point; but, I think, on principle, that as soon as the law became such that a wife separated from her husband might properly and legally have the custody of her infant children under the age of seven years, though the husband objected, it became a reasonable and necessary thing that she should clothe and feed those children according to their degree. It is true that in one sense, this is an expense voluntarily incurred by the wife, as she is not obliged to ask for, or take the custody of her child; but I think the wife's authority in such cases is to pledge the husband's credit for her reasonable expenses, though they exceed what she is obliged to incur.

The wife of the richest subject in the realm, when driven from her husband's roof, is not obliged to have servants or clothes suitable to her degree. If she chooses to clothe herself economically, and dispense with attendance, she may do so; yet I apprehend it will not be disputed that she may bind her husband by ordering clothes, and hiring servants reasonably fit for her degree; and if her husband's station be high enough to make it reasonable, ordering liveries for those servants. All those expenses are voluntary in one sense, for if the wife chooses she need not incur them. I cannot but think that the very object of the statute was that a wife should not be compelled to do violence to her feelings as a mother by parting from her infant child, when she was not in fault; and that when she does choose to keep her child, and is by

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law empowered to do so, the expenses necessarily incurred in doing so are necessary and reasonable, having reference to her station, not merely as the wife of a person in the station of the defendant, but as the wife properly having the custody of the infant children of the marriage.

It is argued that if this is so, the liability of the father is changed, for a father's legal obligation to support his child is not more than to supply such food and clothing as are necessary for health, whilst, if there is any authority given by law to the wife, it is to pledge the husband's credit for such necessaries for the child as may be reasonable with reference to the husband's station. This is true, but the same remark applies to the wife. A husband, whilst his wife resides with him, chooses his own style of life, at least in theory. In the quaint language of Hyde, J., in *Manby* v. *Scott* (1), if "the wife will have a velvet gown and a satin petticoat, and the husband thinks mohair or farendon for a gown, and watered tabby for a petticoat is as fashionable, and fitter for his quality," the husband is to decide, and neither the wife nor a jury, it may be, consisting of drapers and milliners. But when the husband has without cause turned his wife out of doors, or by his own fault rendered it impossible for her to reside with him, the rule is changed. The husband is no longer the sole judge of what is fit, but the law gives the wife in such a case authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable. This increase of the husband's liability only comes into play when he is in fault, and so is not unjust. I think the increased liability incurred in respect of the wife having the custody of the children falls within the same principle, and therefore I think that this rule should be discharged.

COCKBURN, C.J. I am compelled in this case to differ from the rest of the Court. The action is brought to recover the price of necessaries in the way of clothing supplied to the child of the defendant, while living with the mother, who is separated from her husband the defendant. The wife, having left the husband for reasons which for the present purpose we must take to have

(1) 1 Mod. at p. 138.

been sufficient to justify her doing so, obtained from the Master of the Rolls an order under the 2 & 3 Vict. c. 54, that the child, being under the age of seven years, should be placed in her custody. Not having the means of maintaining the child, the mother procured the necessaries in question for the child on credit, and the present action having been brought to recover the price, the question which presents itself is whether the defendant is liable in respect of the necessaries so supplied. I am of opinion that he is not.

It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation. "It is a clear principle of law," says Parke, B., in *Mortimore* v. *Wright* (1), "that a father is not under any legal obligation to pay his son's debts, except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose upon him any legal liability." It is clear that if the child had been living in the father's family, the father would not have been liable for necessaries supplied to it by a third party on his omitting to provide them. A fortiori, there would be no such liability where the child was living against the father's will, with another person. Can it make any difference that the child is living, equally against the father's will, with the mother? If both mother and child were living as part of the father's family, the wife would not have authority to pledge the husband's credit for necessaries supplied to the child contrary to the husband's will. Can she do it any the more because she and the child are living apart from him?

It is admitted that there is no direct liability on the father in respect of articles supplied on credit as necessary to the child; but it is said that articles thus supplied for the use of the child may be treated as necessaries to the mother. The difficulty I have in adopting this view arises from the fact that there is no obligation on the part of the mother to take the child at all. It is on the petition

(1) 6 M. & W. at p. 488.

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of the mother that an order is made as to the custody of the child under the 2 & 3 Vict. c. 54. It is optional with the mother to apply for such an order. And though it is true that a married woman, separated from her husband, may, under such circumstances as the present, incur expenses, as necessary to the degree and means of the husband and herself, which, if she were living in the husband's household, it would be in his power to refuse her, I cannot see any analogy between things which are necessary to the degree and station of the wife and the expense incidental to the maintenance of a child; the keeping of such child by the mother, instead of leaving it with the father, not being, so far as I can see, in any sense, a thing necessary to the mother. The fact is that a case has arisen for which the law has not made provision. It does not seem to have occurred to the legislature, on passing the 2 & 3 Vict. c. 54, that there might be cases in which a mother, to whom the custody of a child was committed under the statute, might not have the means of supporting it. It does not appear to me that we can properly supply the defect by extending the fiction of law, that a wife, leaving her husband for sufficient cause but against his will, is armed by him with authority to pledge his credit for necessaries, to the case of necessaries supplied to a child. That fiction was resorted to owing to defect of our law which afforded to a married woman, though deserted by her husband, or compelled by his conduct to quit his roof, no means of compelling her husband to provide for her, unless she proceeded for a divorce a mensâ et thoro, and obtained alimony. Under a system of law more perfectly and completely dealing with the relation of husband and wife, a court, having cognizance of matters relating to this relation, would have authority to afford redress to a married woman under the circumstances referred to, even without an application for a divorce or judicial separation. If the law were in this case what it should be, the question as to provision to be made by the father for children properly in the custody of the mother would be taken into consideration and fixed by competent authority. I do not think that we can meet the case now arising from want of legislation on the subject by straining the law relating to the liability of a husband for necessaries supplied to a wife living apart from him, so as to make it embrace necessaries supplied to a child, for which, if

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the child were living with him, he would not be liable. In doing so it seems to me that we should be legislating to meet a case in which the law is insufficient. This I think we cannot properly do, and I am therefore of opinion that the rule should be made absolute; but my learned Brothers being of a different opinion the rule will be discharged.

Rule discharged.

Attorneys for plaintiffs: *Stocken & Jupp.*
Attorneys for defendant: *Young & Jackson.*

JONES AND OTHERS *v.* PHIPPS.

July 3.

Landlord and Tenant—Notice to Quit—Notice by Agent—Notice by Cestui que Trust in his own Name.

The trustees of G.'s marriage settlement purchased in October, 1863, a farm partly with trust money, G. supplying the rest. At the time of the purchase the defendant held the farm as yearly tenant to the vendor. From the time of the purchase the trustees left the entire management and control of the farm to G., and he had had with their consent the entire management of all the other settled estates for twenty-six years. G. negotiated with the defendant as to the terms on which the tenancy should continue, dealing as if he were the owner of the farm, without mentioning trustees. The defendant not agreeing to the terms, in January, 1864, G., in his own name as landlord, gave him notice to quit at the end of the year. In March and August, 1864, receipts for rent were given to the defendant in the name of the trustees. The defendant disputed the validity of the notice, and would not quit at the end of the year, on which ejectment was brought, the trustees not knowing till then that G. had given the notice to quit. The Court having power to draw inferences of fact:—

Held, that the inference to be drawn was that the notice was with the sanction of the trustees, as it was incident to such an authority as the trustees had delegated to G. that he should determine the tenancy at any time he might think proper; and that it was not necessary to the validity of a notice given by such a general agent that his agency should appear on the face of the document; that the notice was therefore valid.

Doe v. *Goldwin* (2 Q. B. 143) noticed.

THIS was an action of ejectment brought by John Jones, William Spooner, and Maxwell Graves, to recover possession of Upper Clopton Farm, in the parishes of Mickleton and Minton, county of Gloucester.

The defendant defended for the whole of the land and premises claimed in the writ, which was dated the 11th of March, 1865.

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At the trial before Channell, B., at the Gloucester summer assizes, 1865, a verdict was found for the plaintiffs, subject to the opinion of the Court upon a case to be settled by the judge.

The plaintiffs, John Jones and William Spooner, purchased the Upper Clopton Farm from the Rev. Robert Biscoe and the Misses Biscoe, by a conveyance dated the 24th of October, 1863, which declared that the purchase-moneys were paid by Messrs. Jones and Spooner, and the habendum is to them, their heirs, and assigns, freed and discharged from a certain mortgage in the indenture mentioned. This conveyance makes no reference to the plaintiff Sir Maxwell Graves, or to his marriage settlement, or to the trusts thereof. Sir Maxwell Graves supplied from his own funds 2000*l.* of the purchase-money of this estate.

At the trial the plaintiffs tendered in evidence the marriage settlement of Sir Maxwell Graves, dated in 1838, by which estates called the Mickleton estates were conveyed to trustees for him and his intended wife and the issue of the marriage.

One of the trusts of this settlement was to permit Sir Maxwell Graves to receive the rents, interests, and profits of the settled estates. Messrs. Jones and Spooner were not the trustees named in this settlement. No appointment of either as trustee under the settlement of 1838 was produced. Mr. Spooner was called as a witness, and stated that he and Mr. Jones acted as trustees under that settlement.

Counsel, on behalf of the defendant, objected to this marriage settlement being given in evidence, on the ground that it did not refer to the premises in dispute, and that the conveyance under which the plaintiffs, Messrs. Jones and Spooner, shewed title, made no reference to that settlement or to the trusts thereof. The settlement was therefore received, subject to such objection.

At the time of the purchase of the Clopton Farm the defendant was yearly tenant of the farm under an agreement between him and the Rev. Robert Biscoe, but the trustees and Sir Maxwell Graves were not, nor was either of them, aware of the terms of the agreement otherwise than that the same was for a Candlemas taking.

From the time of the purchase the purchasers, Messrs. Spooner and Jones, left to Sir Maxwell Graves the entire management and

control of the farm, he residing at Mickleton, and the purchasers residing, one in Staffordshire, and the other in Radnorshire. He had had, with their consent, the entire management of all the estates included in his settlement of 1838 for a period of twenty-six years.

Negotiations from time to time took place between the defendant and Sir Maxwell Graves after the purchase of Clopton Farm with reference to the defendant continuing tenant, and also with reference to repairs upon the farm. During the negotiations the defendant was not aware who was the purchaser of the farm from his late landlord, and he negotiated with Sir Maxwell because Sir Maxwell informed defendant that he, Sir Maxwell, had bought it, without naming any trustees, and treated the farm as his own. Under the belief thus induced that Sir Maxwell was the true owner and landlord, and confirmed in this belief by a letter from Sir Maxwell's solicitor, demanding the rent as due to Sir Maxwell (without mention of Messrs. Jones and Spooner), the defendant expressed his willingness to hold the farm under Sir Maxwell, who was the only one of the plaintiffs whom he saw or negotiated with upon the subject. The defendant, under this belief, asked Sir Maxwell to erect some new buildings on the farm, and obtained from him poles to repair his fences, and also hurdles to fence the land. The poles were taken from the private woods of Sir Maxwell, and the hurdles were purchased by him afterwards. Sir Maxwell prepared and submitted to the defendant certain conditions in writing upon which he would be allowed to continue tenant, therein describing himself as the landlord; and on the defendant refusing to hold the farm on such conditions, Sir Maxwell Graves, on the 27th of January, 1864, signed and gave to the defendant the following notice to quit:—

"I hereby give you notice to quit, and deliver up to me or my assigns on Candlemas Day, 1865, the possession of the messuage, farm, land, &c., known as Upper Clopton Farm, situate, &c., which you lately held of the Rev. Robert Biscoe, and now hold of me, as tenant, &c."

Sir Maxwell, in giving this notice, acted under the general authority he supposed himself to have. He did not inform Messrs. Spooner and Jones that he was about to give, or had given, the

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notice to quit until after this action was brought, nor did he ask their assent or advice as to the notice or the bringing of this action. They knew nothing of the notice or the action till after the 11th of March, 1865 (the date of the writ). The defendant never in terms assented to the notice, or to the right or power of Sir Maxwell Graves to give it, nor did he ever repudiate it, except as hereinafter mentioned.

In March and August, 1864, the defendant received receipts for rent, "as due to Messrs. Jones and Spooner, trustees of Sir M. and Lady Graves," from Messrs. Rendall & Sons, who were solicitors to Sir Maxwell Graves, and had also authority, on behalf of Messrs. Spooner and Jones, to receive these rents from the defendant, and give receipts in their names.

In February, 1865, the defendant was requested to give up possession of the farm, and he then questioned the validity of the notice to quit, and refused to give up possession. The defendant still refusing to hold the farm on the conditions, and refusing to give up possession, this action was brought.

It was agreed that the Court should have power to draw such inferences of facts as a jury ought to have drawn from the above statement.

The question for the opinion of the Court was, whether the notice to quit was sufficient to determine the tenancy of the defendant. And whether the plaintiffs or any of them were, at the time this action was brought, entitled to recover possession of the Clopton farm.

April 21. *Powell, Q.C.* (*Macnamara* with him), for the plaintiffs. There are two questions. First, a notice to quit given by an agent in his own name is sufficient, assuming, from the facts stated in the case, that the Court can draw the inference that Sir M. Graves had authority to give a notice to quit. It is not necessary that the notice should be given in the name of the landlord, where the person giving the notice has an absolute control over the premises, and a beneficial interest in them. A receiver appointed by the Court of Chancery, with authority to let lands, may give a notice to quit in his own name: *Wilkinson* v. *Colley* (1); *Doe* v.

(1) 5 Burr. 2694.

Read. (1) The difficulty seems to be created by a dictum of Lord Denman, in *Doe* v. *Goldwin* (2), who is reported to have laid down that a mortgagor could not, as agent for a mortgagee, give a notice to quit in his own name. But it was not necessary to decide the point in that case. Secondly, from the facts stated in the case, Sir M. Graves, having been left by the trustees in the uncontrolled dominion over this, and over the other trust property for so many years, had their authority to give a notice to quit.

Lanyon (*Huddleston, Q.C.*, with him), for the defendant. An agent cannot give a notice to quit in his own name. The tenant is entitled to know on whose behalf the notice to quit is given. In Cole on Ejectment, at p. 44, it is stated: "A notice to quit given by an agent should purport to be given in the name and on behalf of the principal. If given in the agent's name, and on his own behalf, that is not sufficient;" and in Woodfall's Landlord and Tenant, at p. 308, the same proposition is laid down. In *Doe* v. *Goldwin* (3), Lord Denman says: "Now, if Mr. Lister (the mortgagor) be considered as merely the agent of the mortgagees, the notice is bad, both because the notice is in his own name and not in that of his principals, and also because no authority from them was proved." These authorities shew that an agent cannot give a notice to quit in his own name. Secondly, the Court cannot, from the facts, infer that Sir M. Graves had authority to give a notice to quit.

Powell, Q.C., in reply. In Story on Agency, s. 246, n., all the authorities bearing on the point are collected, and it is observed that the cases on the subject are not entirely in harmony.

Cur. adv. vult.

July 3. The judgment of the Court (Mellor, Lush, and Hannen, JJ.) was delivered by

LUSH, J. The decision in this case must depend on the answers to be given to two questions, one of fact, the other of law. The question of fact is, whether Sir Maxwell Graves had authority from the trustees, in whom the legal estate was vested, to give notice to quit, to determine the defendant's tenancy. The question

(1) 12 East, 57. (2) 2 Q. B. 143-146. (3) 2 Q. B. at p. 146.

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of law is, whether, assuming that he had such authority, a notice to quit given in his own name, not purporting to be given as agent of the trustees, is valid.

On the first point, we are of opinion that the facts stated lead to the conclusion that Sir Maxwell Graves had the authority of the trustees to give a notice to quit. He had assumed the entire control over the farm from the time it was purchased in 1863, and had for a period of twenty-six years been allowed by the trustees to have the entire management of all the other settled estates.

We therefore infer that it was with the sanction of the trustees that he (who had himself furnished a portion of the purchase-money of the farm) dealt with it as his own, and negotiated with the defendant as to the terms and continuance of the holding. It was incidental to such an authority that he should determine the tenancy by notice to quit at such time as he should think proper. As regards the defendant, he could have been under no doubt whether the notice was binding, inasmuch as he was not aware that the estate was vested in trustees, but always treated with and considered Sir Maxwell as the legal, as he was in fact the equitable, owner of the farm.

On the second point, we are of opinion that it is not essential to the validity of a notice to quit by such an agent, that his agency should appear on the face of the document itself. The distinction is between a general agent and one holding a special or limited authority. Thus it was held in *Wilkinson* v. *Colley* (1), and *Doe* v. *Read* (2), that a notice given in his own name by a receiver appointed by the Court of Chancery was a valid notice to quit.

On the other hand, *Doe* v. *Goldwin* (3) was cited, where Lord Denman, C.J., in delivering the judgment of the Court, laid it down that a mortgagor, who had mortgaged subsequently to the demise to the defendant, could not give a notice to quit in his own name; the case, however, did not call for a decision upon that point, as the Court held, upon the construction of the mortgage, that there was a re-demise to the mortgagor until default, and it appeared that no default had been made. This dictum has been adopted in the text-books as an authority for the proposition that

(1) 5 Burr. 2694. (2) 12 East, 57. (3) 2 Q. B. 143.

a notice by an agent is bad if it does not state that it is given by authority, or in the name of the principal,—a proposition, we think, too general, and which requires the qualification we have adverted to.

It is clear that the notice must be such as the tenant may act upon with safety, that is, one which is in fact, and which the tenant has reason to believe to be, binding on the landlord. The notice in this case does fulfil these conditions. We therefore give our judgment for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Sandys & Knott.*
Attorneys for defendant: *Surr & Gribble.*

ALDOUS *v.* CORNWELL.

July 3.

Promissory Note—Immaterial Alteration by Payee.

A promissory note expressed no time for payment, and while it was in the possession of the payee, the words "on demand" were added without the assent of the maker. In an action by the payee against the maker:—

Held, that, as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument.

The statement in the second resolution of *Pigot's Case* (11 Rep. at fol. 27a), "if the obligee himself alters the deed . . . although it is in words not material, yet the deed is void," dissented from.

DECLARATION, that the defendant, on the 8th of November, 1865, by his promissory note, promised to pay the plaintiffs 125*l.* on demand.

Plea, that the defendant did not make the note, as alleged.

At the trial before Shee, J., at the sittings in London after Trinity Term, 1865, the following promissory note, signed by the defendant, was put in:—

"On demand. "November 8th, 1865.

"I promise to pay Mr. Ed. Aldous the sum of 125*l.*"

But it was proved that the promissory note, when delivered to the plaintiff, did not contain the words "on demand," and that these

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words had been inserted while the note was in the possession of the plaintiff, the payee, without the knowledge of the defendant, but there was no positive evidence to shew by whom the alteration was made.

The learned judge directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant, if the note was rendered void by the alteration.

A rule having been obtained accordingly, on the ground that a material alteration had been made in the note after it was given,

June 9. *Finlay* shewed cause. The alteration made in the note is immaterial; and an immaterial, though unauthorized, alteration does not vitiate the note. The principle on which an alteration avoids an instrument is, that it varies the contract between the parties. In *Master* v. *Miller* (1), the time of payment was accelerated; in *Burchfield* v. *Moore* (2), a place of payment was added to the acceptance; in *Gardner* v. *Walsh* (3), the name of another maker was added. In all these cases the contract was altered. If an alteration is made to correct a mistake, it would not avoid the note: *Byrom* v. *Thompson.* (4) Here it does not appear by whom the alteration was made, and even if made by the plaintiff, it does not affect the instrument, as the alteration is not material. There is no difference between a promissory note which expresses no time for payment, and one to which the words "on demand" are added: Byles on Bills, p. 195, 9th ed.

R. V. Williams, in support of the rule. The ground on which an alteration avoids an instrument is explained in *Davidson* v. *Cooper* (5) to be "that a party who has the custody of the instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part." If the alteration is made in the effective words of an instrument, and the payee, in whose custody it is,

(1) 4 T. R. 320; 1 Sm. L. C. 796.
(2) 3 E. & B. 683; 23 L. J. (Q.B.) 261.
(3) 5 E. & B. 83; 24 L. J. (Q.B.) 285.
(4) 11 A. & E. 31.
(5) 13 M. & W. 343, 352.

intended to alter it, it is unimportant whether the alteration be material or not. *Master* v. *Miller* (1) has decided that the rule relating to the alteration of deeds laid down in *Pigot's Case* (2) is applicable to promissory notes. The second resolution in *Pigot's Case* (3) states "so if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void." It must be assumed that the plaintiff either made the alteration or assented to it, because he sues on it in its altered form; and *Pigot's Case* (2) is therefore a direct authority for the defendant; and it has never been questioned. In *Calvert* v. *Baker* (4) a bill having in the first instance been accepted generally, was subsequently altered by inserting the words, "payable at Williams & Co.'s, bankers," the alteration was immaterial, yet it was held to avoid the bill. In *Mollett* v. *Wackerbarth* (5) the Court seemed to think that if the alteration became material under any circumstances, it would avoid the instrument. Here the defendant might be prejudiced, as by the insertion of the words "on demand," it might make it more difficult for him to shew that the note was delivered as an escrow, or to prove an equitable plea setting up a collateral contract, which, according to *Davis* v. *Jones* (6) he would have been allowed to do. It is manifest that it was the intention of the plaintiff to commit a fraud; the policy of the law requires that he should keep the note intact, he has not done so, and he cannot complain that it is void.

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Blackburn, and Lush, JJ.) was delivered by

LUSH, J. This was an action by the payee against the maker of a promissory note, expressed to be payable on demand. The plea denied the making of the note.

At the trial before the late Mr. Justice Shee it was proved that the words "on demand" were added after the note had been delivered to the plaintiff. It did not appear who made the alteration, but it was assumed to have been made by the plaintiff, and no

(1) 4 T. R. 320; 1 Sm. L. C. 796.
(2) 11 Rep. 26 b.
(3) 11 Rep. at fol. 27 a.
(4) 4 M. & W. 417.
(5) 5 C. B. 181; 17 L. J. (C.P.) 47.
(6) 17 C. B. 625; 25 L. J. (C.P.) 91.

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question was raised as to this fact. The learned judge directed a verdict for the plaintiff, reserving the point whether by such an alteration the note was rendered void. No objection having been made to the pleadings, we must consider the case as if the question had been properly raised on the record.

It was admitted, and properly so, on the argument, that the addition of these words did not alter the legal effect of the instrument, but only expressed what the law would otherwise have implied. But it was contended, upon the authority of *Pigot's Case* (1), and *Master* v. *Miller* (2), that the alteration, having been made by the payee and holder, though in a matter not material, avoided the instrument.

In *Pigot's Case* (3) it is said, "If the obligee himself alters the deed by any of the said ways (viz., by interlineation, addition, erasing, or by drawing a pen through the line, &c.), although it is in words not material, yet the deed is void, but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed." For this proposition Dyer, 9 Eliz. fol. 261 b, is cited. Shep. Touch. vol. i. p. 68, is to the same effect. It was found as a fact in *Pigot's Case* (1) that the alteration, which was not a material one, was made by a stranger, and judgment was given for the plaintiff, so that the case itself is not a decision upon the point in question. *Master* v. *Miller* (2) extended the doctrine, as regards material alterations, to bills of exchange; and subsequent cases have applied it indiscriminately to all written instruments, whether under seal or not: see *Davidson* v. *Cooper*. (4) No authority was cited, nor are we able to find one, in which the doctrine has been acted upon, and an instrument held to be avoided by an immaterial alteration. There are cases to the contrary, though we cannot regard them as entirely satisfactory. Thus in *Lord Darcy* and *Sharpe's Case* (5), an alteration in a bond not material made by the executor of the obligee was held not to vitiate the bond. But the Court seemed to lay stress on the fact that the alteration was in favour of the obligor.

(1) 11 Rep. 26 b.
(2) 4 T. R. 320; 1 Sm. L. C. 796.
(3) 11 Rep. at fol. 27 a.
(4) 11 M. & W. 778; in error, 31 M. & W. 343.
(5) 1 Leon. 282.

In *Sanderson* v. *Symonds* (1) the holder of a policy of insurance on a ship on a voyage to the coast of Africa, during her stay there, and back to Liverpool, with liberty to "touch and stay at any port or places to sell, barter, and exchange, and load, and unload, and re-load at any of the ports and places she may call at," had, fearing that these words might not be sufficiently extensive for his purpose, added after the words "during her stay," the words "to trade." Several of the underwriters had initialed the alteration, but the defendant refused to do so, on the ground that he never underwrote trading policies to Africa, and he offered before the loss to cancel his subscription and return the premium, rather than assent to such an alteration. The plaintiff refused to accept this offer, and held to the policy. The ship was afterwards lost, and the plaintiff sued the defendant for his subscription; the defendant resisted the action on the ground that the alteration avoided the policy so far as he was concerned. It is to be observed here that both parties thought the alteration material at the time it was made. The Court, however, held that the words so added expressed no more than was already contained in the policy as signed by the defendant, and therefore that the defendant was not discharged. This case might have been cited as conclusive upon the question before us, but for the reasons assigned by the different members of the Court for their judgment. Dallas, C.J. (2), said that the rule was intended not so much to guard against fraud as to insure the identity of the instrument, and prevent the substitution of another without the privity of the party concerned. "But the present case," he said, "stands on its own circumstances. The instrument is a policy of insurance signed by a number of individuals wholly unconnected in interest, and between whom no privity can exist. Indeed, it has never been contended that this was an alteration without the privity of the party; and the old cases turn entirely on alteration made without the privity of the party. Here the instrument was shewn to all the parties concerned. Those who put their initials to the alteration thereby signified their consent to it; those who refused to do so expressed their denial by the absence of their initials. But the latter were bound by the policy as it stood at the first, the former by the policy in its altered state."

(1) 1 B. & B. 426. (2) 1 B. & B. at p. 429.

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Park, J. (1), said, "In all the cases on policies the Court refers to the materiality of the alterations. The alteration here is immaterial, the risk stands as it stood before, and the writing immaterial words does not vacate the policy." And Burrough and Richardson, JJ., base their judgments on the fact that the risk was not varied by the alteration.

Had the alteration in that case been a material one, the fact that some of the underwriters had assented to it, and that it had been shewn to those who ~~expressed~~ refused their assent, would not have prevented the operation of the rule as against the latter. This had been decided in two prior cases in the same Court, *Langhorn* v. *Cologan* (2) and *Fairlie* v. *Christie* (3), in each of which the dissentient underwriters had been held to be discharged by a material alteration in the policy, though they had been asked to join others who had assented, and had refused to do so. The judgment of Dallas, C.J., cannot therefore stand upon that ground, and it is obvious the real ground of the decision in *Sanderson* v. *Symonds* (4) was that the defendant was not, and could not, be prejudiced by the alteration. Why the Court should have limited the doctrine they there laid down to policies of insurance, it is not easy to understand. We cannot discover any reason for making a distinction between that and any other species of contract.

Another case is that of *Catton* v. *Simpson* (5); there the plaintiff had joined the defendant as his surety in a joint and several promissory note. The payee, having pressed the defendant for payment, had consented to give time on his procuring a third person to add his name to the note. The plaintiff, who had afterwards paid a moiety of the amount, sued the defendant for re-payment, and it was objected that, as the name of the third party had been added without the plaintiff's consent, he had been discharged, and had paid the money in his own wrong. Patteson, J., who tried the cause, directed a verdict for the plaintiff; and the Court refused a rule for a new trial, holding that "it was not an alteration of the note, but an addition which had no effect." It is true that in the subsequent case of *Gardner* v. *Walsh* (6), this Court expressly

(1) 1 B. & B. at p. 431.
(2) 4 Taunt. 330.
(3) 7 Taunt. 416.
(4) 1 B. & B. 426.
(5) 8 A. & E. 136.
(6) 5 E. & B. 83; 24 L. J. (Q.B.) 285.

overruled *Catton* v. *Simpson* (1), not, however, on the ground that an immaterial alteration vacated the instrument, but on the ground that the alteration was a material one.

This being the state of the authorities, we think we are not bound by the doctrine in *Pigot's Case* (2), or the authority cited for it (3); and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one, destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written. We therefore discharge the rule.

Rule discharged.

Attorneys for plaintiff: *Walker & Archer.*
Attorney for defendant: *Warwick King.*

WADDINGTON *v.* ROBERTS.

June 23.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Debtor and Creditor—Composition Deed, Proof of—Evidence.*

A creditor may assent in writing to a composition deed, under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), before the deed is prepared or executed by the debtor; and if the assent be to a deed of composition only, it will be sufficient, although the deed, when prepared, also contains a release.

A memorandum written on the face of the deed, according to s. 196, stating the day and the hour of the day on which the deed was brought to the office of the chief registrar for registration, and that it was duly registered pursuant to the provisions of the Bankruptcy Act, 1861, is primâ facie evidence that an affidavit, pursuant to clause 5 of s. 192, was delivered to the chief registrar, together with the deed; and it is unnecessary to prove the truth of the affidavit.

DECLARATION on a bond for 150*l.* and interest.

Plea: Deed of composition under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), by which the defendant covenanted to pay a composition of 5*s.* in the pound to his creditors.

Issue thereon.

At the trial before Kelly, C.B., at the spring assizes for Gloucester,

(1) 8 A. & E. 136. (2) 11 Rep. at fol. 27 a. (3) Dyer, 261 b.

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the defendant put in evidence the deed. It was made between the defendant of the first part, one W. H. Jackson of the second part, and W. H. Jackson and other the several creditors or persons whose names were subscribed and seals affixed to the schedule thereunder written, or who should, before or after the execution thereof by the debtor, in writing assent to or approve of the deed, and all and every other the creditors of the defendant, of the third part. It provided for the payment of a composition of 5*s.* in the pound, to be paid by half-yearly instalments of 25*l.* into the hands of W. H. Jackson, his executors and administrators, in trust for the creditors, on every 7th day of November and 7th day of May, in each and every year until the sum or composition of 5*s.* in the pound should have been fully paid to all the creditors, whether assenting to the deed or not, the first instalment to be paid on the 7th of November next. The deed also contained a release by the creditors.

A memorandum was written on the face of the deed, and duly sealed with the seal of the court of bankruptcy, stating the day and hour of the day at which the deed was brought to the office of the registrar for registration, and that it was duly registered pursuant to the provisions of the Bankruptcy Act, 1861. It was proved that the deed was executed by the defendant on the 6th of July, 1866; that the execution had been attested by an attorney; and that the trustee had also executed the deed. The deed was not executed by any of the creditors, but the assents in writing of the assenting creditors were put in evidence. The assents were in the following form:—

"I, the undersigned, being a creditor of the said H. Roberts for *l.*, hereby assent to and approve of a deed to be by him executed for the payment of his creditors of a composition of 5*s.* in the pound in discharge of their debts, paid by half-yearly instalments of 25*l.*"

It was objected, on the part of the plaintiff, that the assents given by the assenting creditors did not correspond with the deed, and that there was no proof that the conditions contained in clause 5 of s. 192 had been complied with. (1)

(1) Section 192, clause 5:—"Together with such deed or instrument, there shall be delivered to the chief registrar an affidavit by the debtor, or some

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The Chief Baron overruled the objection, and directed a verdict to be entered for the defendant, reserving leave to move to enter a verdict for the plaintiff.

A rule was obtained accordingly, on the grounds, first, that the assent proved did not sufficiently assent to the deed put in evidence or to its provisions, but assented to a deed not in existence. Secondly, that no proof was given of any affidavit or certificate having been delivered to the registrar in pursuance of clause 5 of s. 192 of 24 & 25 Vict. c. 134. (1)

Gray, Q.C., shewed cause. The first point is concluded by *Rutty* v. *Benthall.* (2) It was decided in that case that the assent of the creditors might be given before the deed is executed or prepared. As to the other point, the maxim, "Omnia præsumuntur ritè esse acta," applies. Wherever a public officer has to perform an act, and evidence is given that he has done that act, the presumption is that every condition has been complied with that makes the act valid. The deed was put in, and on the face of it is written a memorandum of its registration in compliance with s. 196: the presumption therefore is, that the officer would not have registered the deed unless the affidavit by the debtor, under clause 5 of s. 192, had been duly delivered to him. Primâ facie, that is sufficient evidence that the condition contained in clause 5 has been complied with; if it is sought to impugn the affidavit, the plaintiff must do so by direct evidence. In *Reg.* v. *Mainwaring* (3), it was held that the fact of the solemnization of a marriage in a chapel in the presence of the registrar, who could not have been lawfully present unless the chapel was registered, and the

person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number representing three-fourths in value of the creditors of the debtor whose debts amount to 10*l.* or upwards, have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed."

Section 196:—"Every such deed, on being so registered as aforesaid, shall have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the chief registrar for registration."

(1) See ante, p. 580.

(2) Law Rep. 2 C. P. 488.

(3) 26 L. J. (M.C.) 10; 1 Dear. & B. 132.

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fact of the entry of the marriage in his book, was primâ facie evidence that the chapel had been duly registered as a place for the solemnization of marriages. So, in *Sichel* v. *Lambert* (1), it was presumed that a place where a Roman Catholic marriage was celebrated was duly licensed. *Reg.* v. *Cradock* (2) is to the same effect. It is sufficient in an indictment for perjury in an answer to a bill in chancery to prove the signature of the defendant, and it will be presumed that the defendant was regularly sworn as to the truth of its contents: *Rex* v. *Benson.* (3) In *Cheney* v. *Courtois* (4), an affidavit filed with a bill of sale was entitled in the Queen's Bench, and was sworn before a commissioner for taking affidavits in the Exchequer; the affidavit was held sufficient, the Court presuming, until the contrary was shewn, that the officer had rightly performed his duty.

H. James and *Harington,* in support of the rule. There is a distinction between *Rutty* v. *Benthall* (5) and the present case. There the assent was given to a deed of composition and release, here the assent makes no mention of a release; yet the deed contains one. The assent and the deed ought to correspond.

[BLACKBURN, J. Neither my Brother Lush nor myself entertain the smallest doubt that an assent can be given before the deed is executed, and that the assent given in the present case is sufficient. With regard to the other objection, *Grindell* v. *Brendon* (6) is precisely in point. The objection there was, that it was not shewn that the affidavit, which 17 & 18 Vict. c. 36, s. 1 (Bills of Sale Act) requires shall be filed with the bill of sale, was filed. Williams, J., says: "The statute requires the affidavit to be filed at the same time with the bill of sale; the clerk has no authority to receive the one without the other. That which certifies the time of the receipt of the one, therefore, certifies the receipt of the other at the same time." That reasoning applies to the present case.]

A bill of sale is good at common law, but a deed of composition has no effect but under the statute. Unless the conditions contained in s. 192 are strictly complied with, the deed is invalid, and

(1) 15 C. B. (N.S.) 781. 10 Jur. N.S. 818 (C.P.) 116; 9 Jur. N.S. 1057.
(2) 3 F. & F. 837.
(3) 2 Camp. 508.
(4) 13 C. B. (N.S.) 634; 32 L. J. (N.S.) 698. 5 Jur. N.S. 420
(5) Law Rep. 2 C. P. 488.
(6) 28 L. J. (C.P.) 333; 6 C. B.

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the requirements of clause 5 ought to be proved with the same strictness as those contained in the previous clauses. In *Morgan* v. *Savin* (1), Willes, J., says: "The deed has no legal existence until the conditions are performed: the conditions are not conditions precedent, but conditions of the existence of the deed." It is essential to the validity of a deed that it shall be attested by an attorney, and in like manner it is necessary to its validity that an affidavit shall be delivered to the registrar in conformity with clause 5. Amongst other things, the affidavit must state the amount of the value of the property and credits comprised in the deed. The defendant ought to have proved the truth of that statement as strictly as he is bound to prove that a majority in number representing three-fourths in value of his creditors have executed or assented to the deed. (2)

BLACKBURN, J. We have already expressed our opinion that the assents by the creditors to the deed are sufficient. The deed in substance does correspond with them. There is no objection to the assent being given before the deed is prepared or executed by the debtor. Indeed s. 192 expressly says that a majority of creditors shall, before or after the execution of the deed, in writing assent to the deed. Then as to the other question. Section 192 enacts that the deed shall be valid, provided certain conditions are observed, and clause 5 requires that, together with the deed, there shall be delivered to the registrar an affidavit by the debtor, or a certificate by the trustees, containing certain things. The question is whether there is any evidence that that condition has been fulfilled. The evidence is, that the deed between the defendant and his creditors was produced, bearing on its face a memorandum of the day and hour the deed was brought to the office of the registrar for registration, and stating that the deed was duly registered pursuant to the provisions of the Bankruptcy Act, 1861. Now, the deed could not be lawfully registered unless accompanied by an affidavit; then, is the memorandum on the deed primâ facie evidence that an affidavit in compliance with the enactment had been delivered to the registrar? I think it is,

(1) 16 L. T. (N.S.) 333.

(2) See *Bramble* v. *Moss*, Law Rep. 3 C. P. 458.

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because it is to be presumed, until the contrary be shewn, that a public officer, acting in execution of a public trust, would do his duty, and therefore that the registrar would not have registered the deed unless it was accompanied by the necessary affidavit. I can in no way distinguish this case from *Grindell* v. *Brendon*. (1) Then it is argued that the defendant was bound to prove, not only that the affidavit was delivered to the registrar, but also that it was true. This is not necessary. A creditor who desires to impeach the deed may prove that the affidavit contained false statements, but, primâ facie, the contents of an affidavit must be taken to be true, because the person making it is obliged to pledge his oath to its truth, and consequently is liable to punishment if he swears falsely, and the legal inference is, that he has been accurate in what he has sworn. I think, therefore, that there was sufficient primâ facie proof of the fulfilment of clause 5, and consequently the rule must be discharged.

LUSH, J., concurred.

Rule discharged.

Attorneys for plaintiff: *T. White & Sons.*
Attorney for defendant: *Naters.*

May 29.

IN THE MATTER OF THE BAHIA AND SAN FRANCISCO RAILWAY COMPANY, LIMITED, AND AMELIA TRITTIN, RICHARD BURTON, AND MARY ANNE GOODBURN.

Company—Liability of Joint Stock Company issuing a Certificate of Shares under a Forged Transfer—Estoppel—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 25, 35.

T. being the registered holder of five shares in a registered joint stock company, limited, left the share certificates in the hands of her broker. A transfer of the shares to S. and G., purporting to be executed by T., together with the certificates, was left with the secretary for registration. The secretary in the usual course wrote to T., notifying that the transfer had been so left, and receiving no answer after ten days, registered the transfer, and removed the name of T. and placed the names of S. and G. on the register as holders of the five shares, giving them certificates certifying that they were the registered holders of the five specific shares. A. bargained for five shares, through brokers in the usual way on the Stock Exchange,

(1) 28 L. J. (C.P.) 333; 6 C. B. (N.S.) 698.

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and paid the value of five shares, and the specific five shares were transferred to him by S. and G., and the name of A. was registered as the holder of the shares, and share certificates were given to him. It was afterwards discovered that the transfer to S. and G. was a forgery, and the company was ordered to restore T.'s name to the register by rule of court under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35. On a case stated under that section:—

Held, that the giving of the certificate by the company to S. and G. amounted to a statement by the company, intended by the company to be acted upon by purchasers of shares in the market, that S. and G. were entitled to the shares, and that A. having acted upon that statement, the company were estopped from denying its truth. That A. was therefore entitled to recover from the company as damages for the loss of the shares, the value of the shares at the time the company first refused to recognize him as a shareholder, with interest at 4 per cent. from that time.

ON the 11th of May, 1867, it was ordered by rule of court, under 25 & 26 Vict. c. 89, s. 35 (1), that the name of Amelia

(1) The 25 & 26 Vict. c. 89, applies (s. 176) with certain exceptions to companies formed and registered under the Joint Stock Companies Acts of 1856 and 1857.

Section 25:—"Every company under this act shall cause to be kept in one or more books a register of its members; and there shall be entered therein the following particulars: (1) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number; and of the amount paid or agreed to be considered as paid on the shares of each member. (2) The date at which the name of any person was entered in the register as a member. (3) The date at which any person ceased to be a member. And any company acting in contravention of this section, shall incur a penalty not exceeding 5*l.* for every day during which its default in not complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention, shall incur the like penalty."

Section 31:—"A certificate, under the common seal of the company, specifying any share or shares, or stock held by any member of a company, shall be primâ facie evidence of the title of the member to the share or shares or stock therein specified."

By s. 32, the register is to be open to the inspection of a member gratis, and of a stranger on payment of 1*s.*

Section 35:—"If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company or the company itself, may as respects companies registered in England or Ireland, by motion in any of her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the court of session, or in

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Trittin be restored to the register of the Bahia and San Francisco Railway Company in respect of the five shares in the company numbered 84,511 to 84,515 both inclusive, and that the company do pay to Amelia Trittin any dividends that have fallen due since the shares were transferred from her name. And it was further ordered that a special case be stated for the opinion of this Court between the Reverend Richard Burton and Mary Anne Goodburn and the company, for the purpose of determining the amount of damages (if any) which the company are liable to pay them respectively.

1. On the 8th of March, 1866, Miss Amelia Trittin was the registered holder of five shares in the Bahia and San Francisco Railway Company, Limited, hereafter called "the company," and deposited the certificates of the shares with one Thomas Charles Oldham, a stockbroker, and requested him to keep the same and to receive the dividends payable thereon.

2. On or about the 17th of April, 1866, a transfer of the five shares to John Alfred Stocken and Samuel Goldner, purporting to be executed by Amelia Trittin, but which for the purpose of this case is admitted to have been a forgery, was left with the secretary of the company for registration, together with the certificates of the shares.

3. The secretary of the company, in the ordinary course of business, then sent by post to the last place of residence of Miss Trittin a written notice that the deed of transfer had been so received by

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such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained. The court may in any proceeding under this section decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court, if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal in the manner directed by 'the Common Law Procedure Act, 1854,' shall lie."

Section 37:—"The register of members shall be primâ facie evidence of any matters by this act directed or authorized to be inserted therein."

him, and after ten days having received no answer from her, registered the deed of transfer and removed the name of Miss Trittin from and placed the names of John Alfred Stocken and Samuel Goldner upon the register of shareholders as holders of the aforesaid five shares, and share certificates in respect of the said shares were handed to them.

4. In May, 1866, the Reverend Richard Burton through his broker bought on the Stock Exchange four shares in the company, and Mrs. Mary Anne Goodburn by her broker bought one share.

5. About the same time, John Alfred Stocken and Samuel Goldner sold five shares in the company to Arthur Bristowe, a stockbroker, and in pursuance of the above contracts transferred four of the shares comprised in the forged transfer to Mr. Burton, and the remaining one to Mrs. Goodburn.

6. It is admitted that Mr. Burton and Mrs. Goodburn entered into the contracts above-mentioned bonâ fide and for value of the shares, without notice of any fraud, and according to the usual course of business with reference to the purchase of shares, and on or shortly after the 28th of May, 1866, they were duly registered by the company as the holders of the shares, and share certificates in respect thereof were handed to them.

6a. In the above transactions everything was done by the company in accordance with the usual custom of business, and there was nothing in the circumstances so far as they were known to the company to excite their suspicion or to induce them to depart from such usual course of business.

7. The form of certificate used by the company was:—

Certificate of Shares.

Bahia and San Francisco Railway Company, Limited.

Registered under the Joint Stock Companies Act of 1856.

28th January, 1858.

Nos. to . Five shares of 20*l.* each.

This is to certify that is the registered holder of the shares Nos. to in the above company, subject to the articles of association, on each of which there has been paid to this day three pounds.

Given under the common seal of the company,

Signed by two directors. the day of , 18

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8. The articles of association were made part of the case. By art. 1, the regulations of Table B. of the Joint Stock Companies Act, 1856, were excluded, except as expressly set forth in the articles themselves. By art. 25, the board shall determine the mode and conditions of, and the charges for the transfer of shares, but no such charge shall exceed 2*s.* 6*d.* for every transferor named in the instrument of transfer. By art. 26, every original shareholder shall, on payment of such sum, not exceeding 2*s.* 6*d.*, as the directors prescribe, be entitled to a certificate, under the common seal of the company, and under the hands of two of the directors, specifying the shares held by him, and the amount paid up in respect thereof.

The questions for the opinion of the Court were:—1. Whether, as against the company, Mr. Burton and Mrs. Goodburn are entitled to the said shares in the company, or an equivalent number. 2. Whether they are entitled to any and what damages to be paid to them by the company under the above circumstances.

The Court were to make such order and give such judgment as they might think fit, and have power to make and give.

J. Brown, Q.C. (*W. G. Harrison* with him), for the claimants, Burton and Goodburn. The claimants are entitled to be indemnified by the company, either by having shares handed to them, or by such compensation in damages as will put them in the same position as if the title of the persons from whom they had purchased the shares had been valid, on two grounds: first, the statute imposes a duty on the company of keeping a correct register of shareholders, and if they do not do so they are guilty of negligence, and are liable to any one who is damnified by their breach of duty; secondly, the company having admitted Stocken and Goldner into partnership, and furnished them with credentials, after their sale of their shares in the partnership to the claimants, the company are estopped from saying the claimants are not partners; for by issuing the share certificates to Stocken and Goldner, the company affirmed that they were partners, and the claimants having changed their position in consequence, the company are estopped. By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 25, the company are bound to keep a register of the

members, stating the shares held by each member, specifying each share by its number. By s. 31, a certificate under the seal of the company is made primâ facie evidence of title to the shares specified in it. By s. 35, certain power is given to the superior courts to order the register to be rectified; and by s. 37, the register is made primâ facie evidence of the particulars to be inserted in it. By the articles of association of the present company, the regulations of Table B. of the Act of 1856 (19 & 20 Vict. c. 47) are not to apply; but by articles 25 and 26, every original shareholder is entitled to a certificate, specifying the shares held by him: and though this in terms applies to original shareholders only, a shareholder to whom shares are transferred, it would seem, has the original certificate returned to him with an indorsement, or a new certificate given to him; at all events the case expressly states, par. 3, that Messrs. Stocken and Goldner were placed on the register and certificates handed to them. And by s. 16 of the Act of 1862, the articles are as binding on members as if they had subscribed or affixed their seal to them, and there were a covenant in the articles on the part of each member to conform to the regulations contained in them. The relation of the members inter se very nearly approaches that of an ordinary partnership. First, then, there is a statutory duty imposed on the company to keep a correct register; and they must make good the losses consequent on a breach of their duty. In *Ashby* v. *Blackwell* (1), a joint stock company having permitted a transfer of stock under a forged letter of attorney, it was held that the company, and not the fair purchaser, should bear the loss, and the Court directed the company to repay the sum he had paid for the transfer with interest at 4 per cent., and Lord Northington, C., observes: "The letter of attorney is no part of the purchaser's title. . . . The title is the admission into the company as a partner pro tanto; he accepted the stock on the conditions of the partnership. . . . The purchaser trusted nobody but the company. He was admitted to this stock, and accepted the transfer according to the terms of the original deed of contract. He must not be deceived by the company." The facts of that case, therefore, make it a stronger case than the present in favour of the claimants. It is true the Lord Chancellor observes upon

(1) 2 Eden, 299, 302, 303.

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the negligence of the company's servants; but in the present case the secretary took no precautions to ascertain the genuineness of the transfer, beyond the mere formal proceeding of writing to Miss Trittin's last place of residence. But, in truth, actual negligence need not be shewn where there is a breach of an absolute duty imposed by statute. In *Davis* v. *Bank of England* (1), stock of the plaintiff in the funds had been transferred to another person in the books of the Bank of England under a forged power of attorney; and Best, C.J., delivering the judgment of the Court, the whole of which is directly in point, says: (2) "It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorized to do so. They may take reasonable time to make inquiries, and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder, who is to suffer, if *for want of inquiring* (and it does not appear that any inquiry was made in this case) they are imposed upon, and allow a transfer to be entered in their books, made without a proper authority." Again, the Chief Justice says: (3) "We are not called on to decide whether those who purchase the stock transferred to them under the forged powers might require the bank to confirm that purchase to them, and to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. But to prevent so far as we can the alarm which an argument urged on behalf of the bank is likely to excite, we will say that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for the keeping of which they receive remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law,

(1) 2 Bing. 393. (2) 2 Bing. at pp. 404-5.
(3) 2 Bing. at pp. 407-8.

who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the legislature to give facility for the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfers to all the various persons through whom such stock has passed." That judgment, no doubt, was reversed on error (1), it was reversed, however, on technical grounds only, and the doctrine contained in it has never been impugned, but on the contrary it has been recognized as good law: see *Coles* v. *Bank of England* (2); *Sloman* v. *Bank of England.* (3) The same doctrine was extended to the register kept by railway companies in *Midland Railway Company* v. *Taylor.* (4)

[LUSH, J. And upheld in *Swan* v. *North British Australasian Company.* (5)]

Secondly, the company, though under a forged transfer, having de facto admitted Stocken and Goldner into partnership, and having moreover, by giving them share certificates, enabled them to sell to the claimants, and then, having registered them also, cannot now deny the partnership of the claimants. The claimants' title is that Stocken and Goldner were de facto on the register, that is all the title necessary as against the company, otherwise a purchaser would have in all cases to investigate the title through all the previous holders. The claimants are therefore entitled to be treated as partners.

[COCKBURN, C.J. There may be a difficulty in saying they are partners; the true ground, as it seems to me, of the company's liability, if they can be made liable at all, is, that they enabled the holders under the forged transfer to hold themselves out to purchasers as the true holders, and the claimants having acted upon what amounted to a representation by the company, the company is now estopped from saying that Stocken and Goldner could not give the claimants a title.]

That will amount very much to the same thing, the claimants

(1) 5 B. & C. 185.
(2) 10 Ad. & E. at p. 449.
(3) 14 Sim. 475, 486.
(4) 8 H. L. C. 751; 31 L. J. (Ch.) 336.
(5) 2 H. & C. 175; 32 L. J. (Ex.) 273.

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will then be entitled to have their loss made good in the shape of damages. This view is strongly supported by what Crompton, J., said in *Ward* v. *South Eastern Railway Company* (1), "Did not the defendants by registering the stock in the name of Ann Watson, widow, in effect make a representation that there was such a person, and that she was the proprietor, such that a reasonable man would believe that it was meant he should act upon it; and are they not, therefore, within the principle laid down in *Freeman* v. *Cooke* (2), estopped from denying the truth of that representation as against the plaintiffs who have changed their position by acting upon it as true?"

Watkin Williams (*Cohen* with him), for the company. The contract which a buyer makes in the market is only for a certain number of shares, not any specific shares, and it is not till the purchase is complete that the company is called upon to act and register the transfer. There is, therefore, no contract on which the company can be held liable to the claimants. Nor is there any breach of duty shewn on the part of the company; the secretary acted with due caution by notifying the proposed transfer to Miss Trittin, the person purporting to transfer, and the case states (par. 6a) that everything was done by the company in the usual course of business.

Ex 114

[BLACKBURN, J. The company are bound by the statute to keep a correct register.] . . . . . .

Only to use due diligence in keeping it correct, not to have a register absolutely correct: see *East Gloucestershire Railway Company* v. *Bartholomew.* (3)

[BLACKBURN, J. That case does not touch the present case.

COCKBURN, C.J. As far as the register is concerned, it does not appear that the claimants ever referred to the register.]

Then it is said that the company, having issued share certificates to Stocken and Goldner, as their credentials of membership, are estopped from denying their title. But the company never asserted they had title, but only that they were on the register as shareholders, which is true. The certificate is no representation to third persons, it is only a document between the holder and the company.

(1) 2 E. & E. at pp. 823-4; 29 L. J. (Q.B.) at p. 181.

(2) 2 Ex. 654; 18 L. J. (Ex.) 114.

(3) Law Rep. 3 Ex. 15.

[BLACKBURN, J. The statute (s. 31) makes the certificate expressly primâ facie evidence of the title of the holder.]

As between him and the company.

[BLACKBURN, J. No, primâ facie evidence generally.]

In all the cases bearing on the subject, the company sought to be made liable had been guilty of negligence; as in *Ashby* v. *Blackwell* (1), where the power of attorney was grossly irregular on the face of it. *Hidyard* v. *South Sea Company and Keate* (2) is the only case really in point. There, on a transfer of stock under a forged letter of attorney, the dividends and stock were ordered to be refunded and restored by the *assignee* to the right owner, and the company were held not responsible.

[BLACKBURN, J. That was a case between the company, the purchaser under a forged letter of attorney, and the true owner; the rights of sub-purchasers had not to be considered.]

But surely the remedy is against the vendor, if the purchaser gets nothing, instead of what he contracted for. The company were not in fault; the claimants were not misled by the company, they made no inquiries, nor ever saw the register, as the Lord Chief Justice has pointed out.

[COCKBURN, C.J. No; but by giving the certificate the company practically armed the vendors with the means of holding themselves out as the holders of these shares.

LUSH, J. The question comes round to this, what does the certificate mean: does it certify only that A. B. is on the register, or does it not rather amount to certifying that he is in reality a shareholder?]

Only that he is on the register.

[BLACKBURN, J. Can that be said in the face of s. 31?

LUSH, J. Suppose after the contract, but before he pays the purchase-money, the purchaser applies to the company to know if his vendor is a member of the company, and the answer is yes? The company would then have made a representation on which they intended the purchaser to act. How does that differ from issuing a certificate, which says the same thing?]

It differs in this: the company do not make a voluntary statement, they are bound to keep a register, and issue a certificate.

(1) 2 Eden, 299. (2) 2 P. Wms. 76.

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[BLACKBURN, J. They are not bound to put a person on the register who is not rightfully entitled.]

But in order to make them liable for putting a person not entitled on the register negligence must be shewn, which is, in effect, negatived in this case. In *Swan* v. *North British Australasian Company* (1), Cockburn, C.J., says, "To bring a case within the principle established by the decisions in *Pickard* v. *Sears* (2), and *Freeman* v. *Cooke* (3), it is, in my opinion, essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered." And in the same case Blackburn, J., says, "I agree that a party may be precluded from denying against another the existence of a particular state of things, but then, I think, it must be by conduct on the part of that party such as to come within the limit so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Freeman* v. *Cooke*. (4) It is pointed out by Parke, B., in the course of the argument in that case, that in the majority of cases in which an estoppel exists, 'the party must have induced the other so to alter his position that the former would be responsible to him in an action for it.' And he had before pointed out that 'negligence,' to have the effect of estopping the party, must be 'neglect of some duty cast upon the person who is guilty of it.' And this, I apprehend, is a true and sound principle."

COCKBURN, C.J. I am of opinion that our judgment must be for the claimants. If the facts are rightly understood, the case falls within the principle of *Pickard* v. *Sears* (2) and *Freeman* v. *Cooke*. (3) The company are bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to

(1) 2 H. & C. at pp. 175, 181, 188; 32 L. J. (Ex.) at pp. 279, 276.
(2) 6 Ad. & E. 469.
(3) 2 Ex. 654; 18 L. J. (Ex.) 114.
(4) 2 Ex. at p. 663, 659; 18 L. J. (Ex.) at p. 119, 117.

them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares. It is stated in this case that the claimants acted bonâ fide, and did all that is required of purchasers of shares; they paid the value of the shares in money on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferors had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery. That brings the case within the principle of the decision in *Pickard* v. *Sears* (1), as explained by the case of *Freeman* v. *Cooke* (2), that, if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.

The only remaining question is, what is the redress to which the claimants are entitled. In whatever form of action they might shape their claim, and there can be no doubt that an action is maintainable, the measure of damages would be the same. They are entitled to be placed in the same position as if the shares, which they purchased owing to the company's representation, had in fact been good shares, and had been transferred to them, and the company had refused to put them on the register, and the measure of damages would be the market price of the shares at that time; if no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares.

BLACKBURN, J. I am of the same opinion. When joint stock companies were established, the great object was that the shares should be capable of being easily transferred; and the legislature

(1) 6 Ad. & E. 469. (2) 2 Ex. 654; 18 L. J. (Ex.) 114.

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has made provision by 25 & 26 Vict. c. 89, s. 25, that the company shall keep a register of the members, and when the capital is divided into shares, each share is to be distinguished by a number, and the shares held by each member is to be specified, and the dates at which each person's name was entered on the register. In order to keep up such a register, the company must alter its register whenever a transfer of shares is made, on the application and payment of a certain sum to them by the person to whom the shares are alleged to be transferred. And the first thing the company would have to do when a transfer was tendered to them, would be to inquire into its validity; but a company may be deceived, and induced, as the company were in the present case, without any negligence, to receive as genuine a forged transfer. They accordingly made an alteration in the register, and made it in fact inaccurate by putting the names of Stocken and Goldner on the register as the holders of particular shares, when in fact they were not so. The statute (s. 31) further provides that the company may give certificates specifying the shares held by any member; and the object of this provision is expressly stated to be that this certificate should be primâ facie evidence of the title of the person named to the shares specified; and the company, therefore, by granting the certificate, do make a statement that they have transferred the shares specified to the person to whom it is given, and that he is the holder of the shares. If they have been deceived and the statement is not perfectly true, they may not be guilty of negligence, but the company and no one else have power to inquire into the matter; and it was the intention of the legislature that these certificates should be documents on which buyers might safely act. Now, on the facts of this case, although according to the practice on the stock exchange, the claimants did not originally contract for these particular shares, the money was paid by them or their broker on the execution by Stocken and Goldner of a transfer, and on the certificate under the seal of the company being handed over to them that Stocken and Goldner were the holders of these particular shares; and it is quite clear that a statement of a fact was made by the company, on which the company, at the very least, knew that persons wanting to purchase shares might act. And the claimants having bonâ fide acted upon

that statement, and suffered damage, can they recover from the company? I think they can, on the principle enunciated in *Freeman* v. *Cooke*. (1) Suppose an action by the claimants against the company, asserting that the shares were the plaintiffs' and that the company refused to pay them the dividends, and so deprived them of the use of the shares, in effect an action of trover. The only plea would be that the plaintiffs were not the true owners of the shares, and there would be a replication by way of estoppel, that the company were estopped from saying that the plaintiffs were not the owners, because they had purchased on a statement of title made by the company, and intended by them to be acted upon; this would clearly amount to an estoppel within the rule defined in *Freeman* v. *Cooke*. (2) The claimants, therefore, would be entitled to a verdict, and it follows that they are entitled as damages to the value of the shares at the time they were converted; that is, at the time when Miss Trittin interfered and claimed the shares.

MELLOR, J. I am of the same opinion. I think the right of action cannot be grounded on negligence; but that the facts do amount to an estoppel on the company from denying the claimants' title. The company need not register a person as a member, under a transfer of shares of which they have any doubt; but can leave the transferee to come to the Court and make out his title. In the present case the company acted apparently without negligence, on the production of the transfer by the broker, and having sent a letter to Miss Trittin and received no answer, they caused the transferees to be registered, and gave them a certificate under seal, clearly intending them to use it in the market as a voucher or statement, that they were the holders of the particular shares. The claimants accordingly purchase the shares, but it turns out that they acquired no title, and their names are struck off the register. I cannot but think that a person must have a remedy against a company for wrongfully striking his name off the register, so as to prevent his having the advantage of the shares he had purchased, and in such an action by the claimants the estoppel would arise

(1) 2 Ex. 654; 18 L. J. (Ex.) 114.
(2) 2 Ex. at p. 663; 18 L. J. (Ex.) at p. 119.

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against the company. The measure of damages would be the value of the shares at the time they ceased to be recognized as shareholders. Whether or not the company may have a remedy over against Stocken and Goldner it is unnecessary to consider.

LUSH, J. I am also of the same opinion. It is not stated what the usual course of business is, but only that the shares were purchased in the usual course. I take it, the claimants having bargained in the share market for a certain number of shares each, they were offered a transfer of the shares which had been transferred by a forged transfer to Stocken and Goldner, the certificate at the same time being handed to them before the completion of the purchase, and by this certificate, in the usual form and under the seal of the company, it is certified that Stocken and Goldner are the registered holders of the specific shares, giving the numbers. Now there is no doubt that the certificate was given by the company to Stocken and Goldner in order that they might use it in the usual way in which such certificates are used, viz., as a voucher to a purchaser of their names being on the register. And the claimants having acted on this statement by the company, there arises an estoppel as against the company, prohibiting them from denying that what it states is true. And the question then is, what does the certificate mean? Does it mean merely, that Stocken and Goldner are on the register, and the company have done their best to ascertain that they are entitled to the shares, but cannot say whether they are so entitled? Or does it amount to a statement that the company take upon themselves the responsibility of asserting that they are the registered shareholders entitled to the specific shares? I think the certificate must amount to the latter assertion. It is the company who are to keep and look after the register, and they are the only persons who have control over it, and they can refuse to register a person until he shews that he is legally entitled. Having, therefore, put the names of Stocken and Goldner upon the register, and granted them a certificate, the company are estopped after that statement has been acted upon, and cannot deny that those persons were the legal holders of the particular shares which have been transferred to the claimants.

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The claimants, therefore, are entitled to recover from the company the value of the shares at the time when they were deprived of them.

Brown, Q.C., asked that the Court would award interest in addition; he stated that the company paid 7 per cent. dividend, and that the company refused to recognize the claimants as shareholders on the 10th of October, 1866.

PER CURIAM. The rule will be that the company do pay to the claimants the value of their respective shares on the 10th of October, 1866, and interest from that time at 4 per cent., as damages, together with costs.

Rule absolute accordingly.

Attorneys for claimants: *Brooksbank & Galland.*
Attorneys for company: *Peachey, Denby, & Peachey.*

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June 1.

Master and Servant—Parent and Child—Action for Seduction—Evidence of Service.

The plaintiff's daughter, being under age, left his house and went into service. After nearly a month the master dismissed her at a day's notice, and the next day, on her way home to her father's house, the defendant seduced her:—

Held, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of the father to her services revived, and there was therefore sufficient evidence of service to maintain an action for the seduction.

DECLARATION for debauching Jane Elizabeth Terry, the daughter and servant of the plaintiff, whereby she became pregnant, and was delivered of a child, in consequence of which the plaintiff lost her services, &c.

Pleas: Not guilty; and that the daughter was not the servant of the plaintiff as alleged.

At the trial before Hannen, J., at the sittings in Middlesex during Term, it appeared that the plaintiff was a builder, in a small way of business at Canterbury. On the 13th of March,

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1867, his daughter, who was nineteen years of age, left his house and went into the service of a Mr. Wakeman, a draper at Deal, as a milliner, at the wages of 20*l.* a year, the service being terminable in the usual way by a month's notice. On the 11th of April Wakeman discovered that the daughter had been to a concert with tickets given by the defendant, one of the military officers quartered at Walmer; and Wakeman gave her notice to leave at once, and paid her a month's wages. On the next day she left Wakeman's house, and started from Deal by railway for her father's house at Canterbury; and on the journey the defendant, who was in the same train, induced her to get into a first class carriage with him, and then and there, as she alleged, seduced her. Her father readily received her when she arrived at home, but he did not expect her, not having at the time received notice that she had left her service. She was afterwards delivered of a child, of which she swore the defendant was the father.

A verdict was found for the plaintiff for 150*l.*, leave being reserved to enter it for the defendant, if the Court should be of opinion that there was not sufficient evidence of service to maintain the action.

M. Chambers, Q.C., moved pursuant to the leave reserved, and also for a new trial on the ground of excessive damages. The foundation of the action is the loss by the plaintiff of the service of the person seduced; the relation, therefore, of master and servant must exist at the time of the seduction, and the mere relation of parent and child, though the child be a minor, is not sufficient. It is true that when the daughter is residing with her father as part of his family, no proof of actual services rendered is necessary if she be a minor; nor need she be actually resident with the father on the very day of the seduction, if she be only temporarily absent, as on a visit, or even for a few days' casual service with another. But in the present case there was a contract for a year's service with another master, and although the master had done all he could to determine the service, it was against the will of the girl that she left, and, indeed, her assent would be unimportant, as she could not, as a minor, terminate a service which must be taken primâ facie to be for her benefit. But assuming the service with Wake-

man to have been terminated either rightfully or wrongfully, still till the girl had reached home, and again become a member of her father's family, no constructive service could arise. Secondly, the damages are excessive, considering the position of the plaintiff and his daughter. No doubt, as is said in Roscoe's Nisi Prius, 11th ed. p. 540, although the loss of service is the legal foundation of this action, and though it is difficult to reconcile with principle the giving of greater damages on another ground, the practice has become inveterate, and cannot now be shaken: per Lord Ellenborough, C.J., in *Irwin* v. *Dearman.* (1) But still some limit must be put, and the position of the plaintiff and the circumstances of this case render 150*l.* damages excessive.

COCKBURN, C.J. I am of opinion that there should be no rule. First, as to the point reserved. It is said that the daughter was not part of the plaintiff's family at the time of the seduction, that therefore there was no service, and that the foundation of the action, loss of service, is wanting. But I think the action will lie. It cannot be disputed that, if on the termination of the service at Deal, the daughter had returned home, and then the intercourse had taken place, there would have been sufficient evidence of service. But the intercourse took place during the transitus, while she was on her way to her father's house. Does that make any difference? It must be taken that when the daughter entered the service she had the intention to return to her father on the termination of the service; the master discharged her with what must be taken to be good cause, and she was received by her father as soon as she reached home. I think there was enough to amount to a constructive service. I take it, if the father had met her on her journey, there can be no doubt she would from that moment have been under his control; or if he had written to her, and had directed she should do some business for him on her way home, he had a perfect right to order a service which he was entitled to demand. But what is the difference, if the father had the right to the service, that he has not actually exercised the right? It seems to me, therefore, that there was, to all intents and purposes, a constructive service at the time

7 Ex. 286

(1) 11 East, at p. 24.

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of the seduction, when the girl was on her way back to resume her former position as a member of her father's family. The action, no doubt, is founded on the special ground of loss of service (this is not very creditable, perhaps, to our law), but the action is substantially for the aggravated injury that the father has sustained in the seduction of his child, and if we were to hold that the father, under the circumstances of the present case, was not entitled to the same redress as if the daughter had reached home, it would certainly involve very mischievous consequences; and I think we ought not to raise any doubt on the subject by granting a rule. On the other point, possibly the damages are higher than we should have given; but the jury must be assumed to have taken all the circumstances into account, and the expense the plaintiff must have been put to, as well as the injury to him as a parent, and I do not think we ought to disturb the verdict.

BLACKBURN, J. I am entirely of the same opinion. In form the action is by the master, having a right to the services of the servant, and having lost the benefit of those services by reason of the wrongful act of the defendant; but though in form this is the nature of the action, the damage by loss of service is in reality merely nominal; and so long ago as Lord Ellenborough's time, as he says, in *Irwin* v. *Dearman* (1), the practice had become inveterate of giving to the parent, or person standing in loco parentis, damages beyond the mere loss of service in respect of the loss aggravated by the injury to the person seduced. In effect, the damages are given to the plaintiff as standing in the relation of parent, and the action has at present no reference to the relation of master and servant beyond the mere technical point on which the action is founded: for in ninety-nine cases out of a hundred, the natural guardian is the master to whom the service is due at the time. In *Maunder* v. *Venn* (2), Littledale, J., a very cautious judge, said, "proof of any acts of service was unnecessary; it was sufficient that the daughter was living with her father, forming part of his family, and liable to his control and command. *The right to the service is sufficient.* . . . . If it were otherwise, no action could be maintained for this injury by a father in the higher ranks

(1) 11 East, at p. 24. (2) Mood. & M. 323.

of life, where no actual services by the daughter are usual." The question therefore is, at the time of the seduction had the father a right to the services of his daughter? I think the facts place the plaintiff and his daughter in the position of master and servant, and that he is entitled to substantial damages as the natural guardian. The girl is under twenty-one, and is therefore primâ facie under the dominion of her natural guardian; and as soon as a girl under age ceases to be under the control of a real master, and intends to return to her father's house, he has a right to her services, and therefore there was a constructive service in the present case. As to the amount of damages, I hold that now the jury are to consider the injury as done to the natural guardian, and all that can be referred to that relation; I do not say that they ought to calculate the actual cost of the maintenance of the grandchild, though they cannot well exclude that fact; but they may consider not only that the plaintiff has a daughter disgraced in the eyes of the neighbours, but that there is also a living memorial of the disgrace in a bastard grandchild. Considering this, are 150*l.* damages too much? I cannot say that they are.

MELLOR, J. I am also of the same opinion. The practice, as it has been said, has become inveterate, and the grounds on which this particular species of action is maintainable and the principle of assessing the damages are somewhat exceptional and anomalous; but it is clear that when a father has a right to the service of the child, the action can be maintained without any proof of actual service. It is said that in the present case the daughter had entered into a contract of service with another master who had discharged her, it may be, on insufficient grounds; that he had no actual right to determine the service, and that the girl's assent is immaterial as she could not renounce the service which primâ facie was for her benefit. But, at all events, the real master had put an end as far as he could to the contract of service and had renounced his rights as master. But then it is said at the time of the seduction the girl had not been actually received at home; the illustration put by the Chief Justice is conclusive to dispose of this objection. I doubt whether any case has been decided which goes quite as far as the present, but the cases cited in the argument of *Dean*

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v. *Peel* (1), and the comment made upon them by the Court, shew that although the daughter be not actually resident with the parent at the time of the seduction, yet if she be a minor, and there is the animus revertendi, that is sufficient to maintain the implied relation of master and servant. Here the daughter was in the course of returning, having already begun her journey home, when the intercourse took place, and that is therefore sufficient. As to the damages, they are not to be confined to the actual damages incurred; the dishonour is always taken as matter of aggravation.

LUSH, J. I am of the same opinion. As long as the relation of master and servant existed between the daughter and an actual master, there could not be that relation between the parent and child. But as soon as the actual service was put an end to, and the daughter was on her way home, being under age, the constructive service to her father revived.

Rule refused.

Attorneys for defendant: *Doyle & Edwards, for De Lasaux, Canterbury.*

May 27.

THE GUARDIANS OF THE BRADFORD UNION, APPELLANTS; THE CLERK OF THE PEACE FOR THE COUNTY OF WILTS, AND OTHERS, RESPONDENTS.

Criminal Lunatic, Order for Costs of Maintenance of, when removed from Prison to Asylum under 3 *&* 4 *Vict. c.* 54, *ss.* 1, 2—*When Order may be made—Retrospective Order—Jurisdiction of County Justices in Borough—Construction of* 11 *&* 12 *Vict. c.* 42, *s.* 6, 11 *&* 12 *Vict. c.* 43, *ss.* 6, 35, *with* 26 *&* 27 *Vict. c.* 77, *as to Poor Law and Lunatic Orders.*

H. L. having been convicted of felony at the Wilts Lent Assizes, 1864, and sentenced to twelve months imprisonment, was accordingly imprisoned in the county gaol, situate in the borough of Devizes, which has its own exclusive jurisdiction. While undergoing his sentence he became insane, and by an order of the secretary of state, under 3 & 4 Vict. c. 54, s. 1, he was removed to a licensed asylum in another county, on the 25th of June, 1864. On the 28th of March, 1867, two justices of Wilts, sitting in the borough of Devizes, and purporting to act under s. 2, after adjudging the settlement of H. L. to be in the parish of B. in the B. union, ordered the guardians of the union to pay to the keeper of the gaol

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(1) 5 East, at pp. 47–49.

the reasonable charges of the inquiry into the insanity of H. L., and of his removal to the asylum, and to pay to the keeper of the asylum 114*l.*, being the aggregate amount of the weekly charges for his maintenance in the asylum from the 25th of June, 1864, to the 24th of March, 1867; and a further weekly sum of 16*s.* from the latter date:—

Held, first, that the order was not invalid by reason of its having been made after the expiration of the term of the lunatic's imprisonment.

Secondly, that the justices for the county had jurisdiction to make the order (though relating to a lunatic) while sitting in the borough, by reason of 11 & 12 Vict. c. 42, and 11 & 12 Vict. c. 43, s. 6, coupled with 26 & 27 Vict. c. 77, which so far rendered nugatory the exceptions in 11 & 12 Vict. c. 43, s. 35.

Thirdly, by Cockburn, C.J., and Lush, J. (Blackburn, J., doubting), that the order was bad as to the 114*l.*, as there was nothing in 3 & 4 Vict. c. 54, s. 2, enabling the justices to make such a retrospective order.

By Mellor, J., that the justices had power under s. 2 to make an order for past maintenance, but that the order ought to be quashed on the ground that it ought to have been applied for before.

CASE stated on appeal under 12 & 13 Vict. c. 45, s. 11, against an order of justices.

1. Henry Lewis was convicted of felony, committed in the county of Wilts, at the Wilts Lent Assizes, in March, 1864, and was sentenced to be imprisoned in the house of correction for the said county, situate in the borough of Devizes, in the said county, for twelve calendar months, and whilst undergoing such sentence, namely, in June, 1864, he became insane, and was by an order of the secretary of state for the home department removed from the said prison to a house licensed for the reception of lunatics, situate at Briton Ferry, in the county of Glamorgan, in pursuance of 3 & 4 Vict. c. 54, and in which house the said lunatic has ever since been confined and maintained.

2. The order of the secretary of state, dated the 28th of June, 1864, recited 3 & 4 Vict. c. 54, s. 1 (1), and proceeded: "And

(1) 3 & 4 Vict. c. 54, s. 1:—"If any person, while imprisoned in any prison or other place of confinement, under any sentence of death, transportation, or imprisonment, or under a charge of any offence, or for not finding bail for good behaviour or to keep the peace, or to answer a criminal charge, or in consequence of any summary conviction or order by any justice or justices of the peace, or under any other than civil process, shall appear to be insane, it shall be lawful for any two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire with the aid of two physicians or surgeons as to the insanity of such person, and if it shall be duly certified by such justices and such physicians or surgeons that such person is insane, it shall be lawful for one of her Majesty's principal secretaries of

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whereas it has been certified to me under the hands of two justices of the peace, and under the hands of two surgeons, being persons authorized as aforesaid, that Henry Lewis, who was at a gaol delivery holden in and for the county of Wilts, on the

state, upon receipt of such certificate, to direct by warrant under his hand that such person shall be removed to such county lunatic asylum or other proper receptacle for insane persons, as the said secretary of state may judge proper and appoint; and every person so removed under this act, or already removed, or in custody under any former act relating to insane prisoners, shall remain under confinement in such county asylum or other proper receptacle as aforesaid, or in any other county lunatic asylum or other proper receptacle to which such person may be removed or may have been already removed, or in which he may be in custody by virtue of any like order, until it shall be duly certified to one of her Majesty's principal secretaries of state, by two physicians or surgeons, that such person has become of sound mind, whereupon the said secretary of state is hereby authorized, if such person shall still remain subject to be continued in custody, to issue his warrant to the keeper or other person having the care of any such asylum or receptacle as aforesaid, directing that such person shall be removed back from thence to the prison or other place of confinement from whence he or she shall have been taken, or if the period of imprisonment or custody of such person shall have expired, that he or she shall be discharged."

Section 2:—"That in all such cases as aforesaid, unless one of her Majesty's principal secretaries of state shall otherwise direct, it shall be lawful for such two justices, or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire into and ascertain by the best evidence or information that can be obtained under the circumstances, of the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person, and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall be lawful for such two justices by order under their hands, to direct the overseers of the parish where they adjudge him or her to be lawfully settled, or in case such parish be comprised in a union declared by the poor law commissioners, or shall be under the management of a board of guardians established by the poor law commissioners, then the guardians of such union, or of such parish (as the case may be) to pay on behalf of such parish in the case of any person removed under this act, all reasonable charges for inquiring into such person's insanity, and for conveying him or her to such county lunatic asylum or receptacle for insane persons, and to pay such weekly sum as they or any two justices shall by writing under their hands from time to time direct for his or her maintenance in the asylum or receptacle in which he or she shall be confined; and in the case of any person removed under any former act relating to insane prisoners, to pay such weekly sum as they or any two such justices as aforesaid, shall by writing under their hands from time to time direct for his or her maintenance in the asylum or receptacle in which he or she is confined; and when the place of settlement cannot be ascertained, such order

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24th of March, 1864, convicted of larceny and sentenced to be imprisoned for one year in the house of correction at Devizes for the same, has become insane, and whereas the lunatic asylum at Briton Ferry, in the county of Glamorgan, has been recommended to me as a fit and proper receptacle for the said lunatic, and whereas it has been certified to me by two justices of the peace that they intend to make an order upon the parish of Bradford-on-Avon, in which the said lunatic has been adjudged to be settled, for the weekly maintenance of the said lunatic in a lunatic asylum, I do hereby, in pursuance of the act of parliament above recited, authorize and direct you to cause the said Henry Lewis to be received from the said house of correction into the said lunatic asylum, there to remain (maintenance for the said lunatic to be provided as aforesaid) until further order shall be made herein. And for so doing this shall be your warrant," &c.

3. The officers of the parish of Bradford, and the guardians of the poor of the Bradford union, were not informed of the lunacy of Henry Lewis, or of his removal to the asylum, until August, 1865, when the proprietor of the asylum applied to the guardians for the expense of maintaining the lunatic up to that date. In December, 1866, the guardians were again applied to by the clerk of the peace for the county of Wilts, to pay the expenses of maintaining the lunatic. On both occasions they refused to make any payment

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shall be made upon the treasurer of the county, city, borough, or place where such person shall have been imprisoned; but if it shall appear upon inquiry to the said or any other two justices of the county, city, borough, or place where such person is imprisoned, that any such person is possessed of property, such property shall be applied for or towards the expenses incurred or to be hereafter incurred on his or her behalf, and they shall from time to time, by order under their hands, direct the overseers of any parish where any money or securities for money, goods, chattels, lands, or tenements of such person shall be, to seize so much of the said money, or to seize and sell so much of the said goods and chattels, or receive so much of the annual rent of the lands or tenements of such person as may be necessary to pay the charges, if any, of inquiring into such person's insanity, and of removal, and also the charges of maintenance, clothing, medicine, and care of any such insane person, accounting for the same at the next special petty sessions of the division, city, or borough in which such order shall have been made, such charges having been first proved to the satisfaction of such justices, and the amount thereof being set forth in such order."

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on the ground that no order had been made on them, and that they were not liable to do so.

4. On the 28th of March, 1867, two justices for the county of Wilts, whilst sitting in the borough of Devizes (the secretary of state not having otherwise directed) made an order addressed to the guardians of the poor of the Bradford union, in the county of Wilts, whereby, after reciting that Henry Lewis had been removed on the 25th of June, 1864, under an order of the secretary of state from the house of correction at Devizes to the Briton Ferry lunatic asylum, they adjudged the place of settlement of Henry Lewis to be in the parish of Bradford, in the Bradford union, and because it appeared that the said Henry Lewis was not possessed of sufficient property which could be applied to his maintenance, they ordered the guardians of the said union to pay from the common fund of the union unto the keeper of the house of correction the sum of 5*l.* 15*s.* 3*d.*, being the reasonable charges of inquiring into the insanity of Henry Lewis, and for conveying him to the lunatic asylum at Briton Ferry, and also to pay unto Charles Pegge, the proprietor of the said asylum, the sum of 114*l.* 15*s.* 4*d.*, being the aggregate amount of the weekly sums or charges for the maintenance of Henry Lewis in the asylum, from the said 25th of June, 1864, to the 25th of March instant, and also to pay to the said Charles Pegge, commencing from the 25th of March instant, the sum of 16*s.* weekly, or such other sum as they or any other two justices should by writing under their hands from time to time direct, for the maintenance of the said Henry Lewis in the asylum.

5. The settlement of the lunatic had not been previously adjudged.

6. The borough of Devizes is a borough with a separate commission of the peace, and has a separate court of quarter sessions, and a recorder, and the charters contain a non-intromittant clause.

7 & 8. The order was served upon the guardians with the notice and grounds of adjudication, signed by the keeper of the house of correction and by Charles Pegge, the proprietor of the asylum; the grounds being that the lunatic was born in the parish of Bradford in 1807.

9. The settlement of the lunatic was at the time of the making of the order in the parish of Bradford.

10. The guardians of the union duly gave notice of appeal against the order, to the clerk of the peace of the county, to the clerk of the peace of the borough, to the keeper of the house of correction, and to the proprietor of the asylum. The grounds of appeal were:— 1. That the justices, being justices for the county only, and not for the borough, had no jurisdiction to make the order. 2. That, at the time of the making of the order, Henry Lewis was not imprisoned in any county, city, borough, or place within the jurisdiction of the said justices, or a criminal lunatic within the meaning of 3 & 4 Vict. c. 54. 3. That the sentence of imprisonment of Henry Lewis had expired long before the making of the order. 4. That the order is retrospective, and therefore bad. 5. That the justices had no power by the order to order the guardians to pay the expenses incurred in inquiring into the insanity of Henry Lewis, or for conveying him to the asylum in June, 1864. 6. That the justices, by the order, had no power to order the guardians to pay the aggregate amount of the weekly sums or charges for the maintenance of Henry Lewis in the asylum from the 25th of June, 1864, to the 25th of March, 1867, or any part thereof. 7. That the justices had no power by the order to order the guardians to pay any weekly sum for the future maintenance of the lunatic in the said asylum. 8. That the order adjudging the settlement of the lunatic, and ordering the guardians to pay the expenses of inquiring into his insanity, and the expenses of maintaining the lunatic, ought to have been made (if at all) at the time when the lunatic was conveyed from the prison to the asylum, or within a reasonable time thereof. 9. That the notice and grounds of adjudication are not signed by the persons required by law to sign the same. 10. That the order ought to have been obtained by the clerk of the peace of the borough, or by the clerk of the peace of the county.

11. To avoid any difficulty arising from the mode in which the appeal clause to the 3 & 4 Vict. c. 54, is worded (1), separate notices of appeal were given both for the borough and county sessions.

12. The questions for the opinion of the Court were:—1. Whether, under the circumstances above stated, the order dated the 28th of

(1) By 3 & 4 Vict. c. 54, s. 4, an appeal is given to the quarter sessions "for the county, city, borough, or place where the matter of appeal shall have arisen."

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March, 1867, is a good and valid order. 2. Whether the guardians are liable to pay the sum of 5*l.* 15*s.* 3*d.*, being the charges of inquiring into the insanity of Henry Lewis, and his conveyance to the asylum, the sum of 114*l.* 15*s.* 4*d.*, being the aggregate amount of the weekly sums for his maintenance in the said asylum from the 25th of June, 1864, to the 25th of March, 1867. 3. Whether the guardians are liable to pay the weekly sum of 16*s.* for his maintenance subsequently to the 25th of March, 1867, in the asylum.

J. D. Coleridge, Q.C. (*Slade* with him), for the respondents. By 3 & 4 Vict. c. 54, s. 1, when a prisoner becomes insane he may be transferred, by the warrant of the secretary of state, to a lunatic asylum. The latter part of the section is conclusive to shew that he is to remain in confinement there until he is sane, whether the term of imprisonment has elapsed or not; and therefore, as long as he remains legally in custody, the justices have jurisdiction under s. 2, and the order for his maintenance, &c., may be made at any time, and need not be at the time of sending the lunatic to the asylum: *Reg.* v. *Clerk of Peace of West Riding.* (1)

[BLACKBURN, J. That case is rather stronger than the present to shew that the order may be made after the lunatic is transferred to the asylum, because under the statute then in question (1 & 2 Vict. c. 14, s. 2) the order could only be made by the same two justices, whereas in the present case it may be made by the same or any other two justices; but that case does not touch the point whether the order can be made after the term of imprisonment has expired.]

If the order may be made after the lunatic has been transferred, and if he is to be kept in the asylum until he be sane, there is nothing to limit the time at which the order may be made.

[LUSH, J. The latter part of the section, as to applying the property of the lunatic (if any) towards expenses "already incurred," shews that the order must in some cases be after the expiration of the imprisonment.]

Secondly. It is objected that the justices, being justices of the county only, had no jurisdiction, sitting in the borough which has

(1) 20 L. J. (M.C.) 18; 15 Q. B. 1025, nom. *Reg.* v. *Elsley.*

exclusive jurisdiction of its own. The power given by 11 & 12 Vict. c. 42, s. 6 (1), to justices of a county to act for the county in criminal matters, though sitting within a place of exclusive jurisdiction, is extended by 11 & 12 Vict. c. 43, s. 6, to matters of civil cognizance. (2)

[BLACKBURN, J. The 11 & 12 Vict. c. 42, s. 6, gives no jurisdiction to county justices sitting in a borough to act in matters arising in the borough. How does this arise in the county, the gaol being in the borough?]

By 4 Geo. 4, c. 64, s. 48, a county gaol, though situate elsewhere, is to be deemed to be part of the county (3); therefore this was a matter arising in the county of Wilts.

(1) 11 & 12 Vict. c. 42, s. 6:—"It shall be lawful for any justice or justices of the peace acting for any county at large, or for any riding or division of such county, to act as such at any place within any city, town, or other precinct, being a county of itself, or otherwise, having exclusive jurisdiction, and situated within, surrounded by, or adjoining to any such county, riding, or division respectively, and all and every such act and acts, matters, and things to be so done by such justice or justices within such city, town, or precinct, as justice or justices for such county, riding, or division respectively, shall be as valid and effectual in law as if the same had been done within such county, riding, or division respectively, to all intents and purposes whatsoever: Provided always, that nothing in this act contained shall extend to give power to the justices of the peace for any county, riding, or division, not being also justices for such city, town, or other precinct, or not having authority as justices of the peace therein, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever."

(2) 11 & 12 Vict. c. 43, s. 6:—"Such of the provisions and enactments in the act aforesaid (c. 42) made and passed in this present session of parliament, intituled 'An act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to persons charged with indictable offences,' whereby a justice of the peace for one county, riding, division, liberty, city, borough, or place, may act for the same whilst residing or being in an adjoining county, riding, division, liberty, city, borough, or place of which he is also a justice of the peace, or whereby a justice of the peace for any county at large, riding, division, or liberty, may act as such within any city, town, or precinct next adjoining thereto, or surrounded thereby, being a county of itself, or otherwise, having exclusive jurisdiction, as are applicable to the provisions of this act, shall be deemed to be incorporated into this act, and to extend to all acts required of, or to be performed by, justices of the peace, under or by virtue of this act, in as full and ample a manner as if the said provisions and enactments were here repeated, and made parts of this act."

(3) See also 28 & 29 Vict. c. 126, s. 57.

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Poland (with him *Lopes*), for the appellants. The order is wholly bad, as made too late; or, at all events, it is bad so far as it relates to past maintenance, as being retrospective. At the expiration of the term of sentence the pauper ceased to be a criminal lunatic, and could not be afterwards dealt with as a criminal lunatic. The warrant of the secretary of state is only to enable a person other than the gaoler to have legal control over the lunatic while the sentence is running, and after that he is entitled to be treated as any other lunatic in a private asylum.

[MELLOR, J. Section 1 contemplates the person remaining in the asylum after the expiration of the sentence, if still a lunatic, and s. 2 gives jurisdiction to the justices "in all such cases as aforesaid."

COCKBURN, C.J. The 23 & 24 Vict. c. 75, s. 8 (1), confirms that view, and shews that he cannot be discharged till certified to be sane, except by an order of the secretary of state, and that till then he is still to be dealt with as a criminal lunatic.]

Secondly. As to the jurisdiction of the justices sitting in the borough, no doubt s. 6 of 11 & 12 Vict. c. 43, by incorporating the clauses in 11 & 12 Vict. c. 42, gives jurisdiction in all cases within c. 43; but s. 35 (2) excepts poor-law and lunatic orders, and they are, therefore, not within the act at all. It is true that 26 & 27 Vict. c. 77 (3), says that s. 35 shall not control s. 6, but this cannot

(1) This section is repealed by 30 & 31 Vict. c. 12, s. 6, and other enactments substituted.

(2) 11 & 12 Vict. c. 43, s. 35:—"That nothing in this act shall extend to, or be construed to extend to, any warrant or order for the removal of any poor person who is or shall become chargeable to any parish, township, or place; nor to any complaints or orders made with respect to lunatics, or the expenses incurred for the lodging, maintenance, medicine, clothing, or care of any lunatic or insane person," &c.

(3) 26 & 27 Vict. c. 77, after reciting s. 6 of the 11 & 12 Vict. c. 43 (called the principal act):—"And whereas by the 35th section of the principal act it is provided that nothing in that act contained shall extend to certain cases therein mentioned: And whereas it is apprehended that the provisions of the said 6th section of the principal act are controlled by the 35th section of the same act, and that justices cannot act under the first-mentioned of the said two sections in the cases mentioned in the said 35th section: And whereas it is expedient that the principal act should be amended as hereinafter provided: Be it enacted by, &c., &c., as follows:—1. The 35th section of the principal act shall not apply to or control the 6th section of the same act, and such last-mentioned section shall be construed as if the 35th section were

have the effect of giving jurisdiction to justices in the matters of lunatics, if such matters are expressly excluded from the act by s. 35. Thirdly, the grounds of adjudication were not properly signed. It has been decided that the mode of procedure in poor-law removals applies to these orders in the case of lunatics: *Reg.* v. *Newport* (1); *Reg.* v. *Glamorganshire.* (2) The clerk of the peace, the county being chargeable in the absence of an order on the parish of settlement, ought to have obtained the order, and signed the grounds of adjudication, and not the gaoler and the keeper of the asylum: see 16 & 17 Vict. c. 97, s. 107. Lastly. The order is clearly bad for the expenses of the past maintenance. The principle is well established that a retrospective rate, or order, which will have the same effect of charging present ratepayers for the expenses of past years, cannot be made without express words in the statute under which it is made: *Rex* v. *Maulden* (3); *Rex* v. *St. Nicholas, Leicester* (4); *Reg.* v. *Darton.* (5) In the present statute there are no retrospective words whatever to enable the justices in any case to make a retrospective order. In 16 & 17 Vict. c. 97, ss. 97, 98, and 99, the justices are enabled to make an order for all expenses incurred by the keeper of the asylum within twelve months of the date of the order. But that statute, by s. 133, does not apply to the case of criminal lunatics. In the present case, there being no retrospective words in s. 2, there is no limitation whatever; and if the section be construed to empower the justices to make a retrospective order as to any of the past expenses, the effect must be that they may make an order at the end of several years for all the expenses of the past maintenance, which is contrary to all the cases cited. *Reg.* v. *Clerk of Peace of West Riding* (6) is no authority to the contrary. The cases cited also shew that the order may be quashed as to so much of it as is retrospective.

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not and never had been contained in the principal act; and any acts done or orders made by justices previously to the passing of this act which would have been valid if this act had been passed at the respective dates of such acts being done, or orders made, shall be, and are hereby declared to be, valid accordingly."

(1) 33 L. J. (M.C.) 155. 10 Jan 1576

(2) 13 Q. B. 561; 18 L. J. (M.C.) 118.

(3) 8 B. & C. 78.

(4) 3 Ad. & E. 79.

(5) 12 Ad. & E. 78.

(6) 20 L. J. (M.C.) 18; 15 Q. B. 1025, nom. *Reg.* v. *Elsley.*

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J. D. Coleridge, Q.C., in reply. Ex concessis there must be some retrospective expenses, such as of the inquiry and removal, and why not those also of maintenance? It is impossible to ascertain without considerable delay what the parish of settlement is. The clerk of the peace was not the person to obtain the order and sign the grounds of adjudication, for the county is not liable until there has been an inquiry and the parish of settlement ascertained, and then only is an order to be made on the treasurer of the county. *Reg.* v. *Clerk of the Peace of West Riding* (1) is directly in point, that the order may be made at any time.

[COCKBURN, C.J. But is the case of *Rex* v. *Maulden* (2) distinguishable?]

The grounds of that decision were, that under the statute (48 Geo. 3, c. 96, s. 17) the order was to be made at the time the warrant is issued, and therefore there was no necessity for implying a power to make a retrospective order. Here the statute clearly contemplates the order being made after the removal of the lunatic to the asylum, and therefore after some costs of maintenance must have been incurred; it is therefore necessary that the justices should have power to make a retrospective order.

[LUSH, J. There is a difference in the language of s. 2, where the parish is to pay, and where the man himself is able to pay. In the latter case the section speaks of expenses "*incurred*, and to be hereafter incurred in his behalf."]

That would go to shew that in both cases the past maintenance was intended to be included. "Maintenance" includes past just as well as future; and clearly the costs of removal are past: and in the last clause all the expenses are lumped together, as incurred on behalf of the lunatic.

COCKBURN, C.J. Three objections have been urged against this order. Two go to the validity of the whole order, and one affects only part of it. On the first two objections, I am of opinion that our judgment must be for the respondents.

The first objection is, that the order was made after the term of imprisonment to which the lunatic had been sentenced had expired.

(1) 20 L. J. (M.C.) 18; 15 Q. B. 1025, nom. *Reg.* v. *Elsley*.
(2) 8 B. & C. 78.

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The facts are, that the pauper, who had been convicted of felony in the year 1864, in the county of Wilts, and sentenced to one year's imprisonment, was imprisoned accordingly in Devizes gaol; pending the imprisonment he became insane, and by an order of the secretary of state in the same year, he was directed to be removed to a licensed lunatic asylum at Briton Ferry, in the county of Glamorgan. No application was made under 3 & 4 Vict. c. 54, from the date of the order, 18th of June, 1864, until March, 1867. In the interval the keeper of the asylum applied to the officers of the parish in which the lunatic's settlement was afterwards adjudicated to be, for payment of the cost of the lunatic's maintenance, and a second application was made to them by the clerk of the peace of the county of Wilts; but in both cases the parish officers refused to make any payment, and properly, for it would have been made in their own wrong, as no order of justices had been obtained, and the parish were not bound to support the lunatic in the asylum except under an order. An order was, however, applied for and made in March, 1867. At first I was inclined to think that, inasmuch as it was made after the expiration of the term of imprisonment, the objection was fatal and the order was bad; but, on further consideration, I think that although the sentence of imprisonment had expired, yet if the lunatic has been transferred from the prison to a lunatic asylum pending the term of imprisonment, he is not entitled to his discharge from the asylum at the expiration of his sentence; and that view is borne out by the subsequent act (23 & 24 Vict. c. 75, s. 8), which enacts that where the lunatic in an asylum would at the expiration of his sentence be entitled to his discharge if certified sane, although the lunatic be not certified to be sane, the secretary of state may order his discharge, to the end that he may be placed in a county lunatic asylum, or otherwise subjected to the same treatment as a non-criminal lunatic. (1) This shews that but for this provision he could not be discharged unless certified to be sane, and was still to be treated as a criminal lunatic. The first objection therefore fails.

The second objection is, that as the order was made by the justices, sitting in the borough, but being county and not borough

(1) See ante, p. 612, note (1).

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justices, it is invalid. The 11 & 12 Vict. c. 42, s. 6, enables county justices to act within a borough for the county as to indictable offences; but it is said although this enactment is extended to the jurisdiction of justices as to summary convictions and orders by s. 6 of 11 & 12 Vict. c. 43, yet s. 35 of the latter act provides that nothing in the act shall extend to orders of removal or with respect to lunatics. But 26 & 27 Vict. c. 77, s. 1, in effect enacts that s. 35 of 11 & 12 Vict. c. 43 shall be repealed so far as it had any operation to control s. 6 of the same act, and therefore, by what is certainly a most remarkable piece of legislation, the operation of s. 6 is left untouched as to the jurisdiction of justices, although other sections of the act, such as s. 11, limiting the time for making the complaints, will still not apply to the orders mentioned in s. 35. The second objection, therefore, also fails.

Thirdly, it is said that the order is bad so far as it is retrospective. The order provides that the parish shall pay all arrears from the period at which the man was sent to the asylum to the time of the making of the order, viz. 114*l.* 15*s.* 4*d.*, and the question is whether s. 2 of 3 & 4 Vict. c. 54, authorizes the making of such an order for past expenses. I feel the force of Mr. Coleridge's observations, and no doubt it is a very serious result to contemplate, that a lunatic prisoner may be sent to an asylum, and yet the keeper, who has no alternative but to receive him, cannot recover the expense of his maintenance unless an order of justices has been made. The position of the lunatic is not satisfactory. On the other hand, if the legislature has omitted to provide for such a case, it is not incumbent or even open to us to legislate in order to supply the omission. I am of opinion we cannot so construe s. 2 as to make it operate on past maintenance. The justices are to inquire into the place of settlement, and having adjudged this, they are to make an order for the payment of the costs of inquiry, and of the conveyance of the lunatic to the asylum, and such weekly sum for his maintenance as the justices think reasonable. Primâ facie this language is prospective, there is nothing which treats of past maintenance, and we start with the proposition, that in all such cases the rate must be prospective and not retrospective, so that the expenses shall fall on the ratepayers who are ratepayers at the moment of the expenses being incurred;

whereas by doing what in effect would amount to the same thing as making a retrospective rate, the expenses of past years are made to fall on the ratepayers of the present year. That being a principle adopted long ago and long acted on, whenever the legislature has thought it expedient to authorize the making of retrospective rates or orders, it has fixed the period as to which the rate or order may be retrospectively made; but the effect of holding that the present section authorizes retrospective orders, unless we could find some reasonable time to which to limit it, would be to allow it to be made with no period of limitation whatever; and it might extend to a period even of ten years or more. The present order, indeed, extends over three years. It occurred to me that it might be confined to a reasonable time; but what is a reasonable time? The statute is altogether silent as to past expenses, and by specifying the expenses of inquiry and of removal, and then a weekly sum, it seems to exclude the making of an order in a lump sum for past expenses. So much, therefore, of the order as applies to these past expenses must be quashed.

BLACKBURN, J. I am of the same opinion on all points but one, and as to that I have not so much doubt as to say that I actually dissent. The first question arises on the 3 & 4 Vict. c. 54, s. 1. [The learned judge read the section.] Stopping there, I agree that the lunatic is to remain in confinement until he be certified to be of sound mind, the secretary of state, whether the term of his imprisonment has expired or not, if the prisoner become sane, having in the one case power to order his removal back to the prison from which he has been removed, in the other to order his discharge, and I think that during the interval after his sentence has expired until he is discharged, he is to be considered as still in confinement under the warrant of the secretary of state, and is to be maintained in the same way as if the term of imprisonment had not expired. Then comes the question, how is he to be maintained? The keeper of the asylum has no legal right against the county, but s. 2 provides as to how he is to be paid. [The learned judge read s. 2.] My doubts are as to how and when the justices are to exercise this jurisdiction of making an order on the overseers or guardians, or treasurer of the county. The

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order cannot be obtained immediately on the prisoner being removed under the order of the secretary of state; whether the parish of settlement be ascertained or not, the inquiry must take some few weeks, and it may take a much longer period; in the meantime the keeper of the asylum is bound at once to receive the lunatic under the order of the secretary of state; he cannot let the lunatic starve, and it must have been intended that the keeper should continue to maintain the lunatic; the consequence of the delay pending this inquiry as to the settlement is, that the payment of the expenses is delayed also, and if the inquiry extend, as it may, into a second year, or further, when the order is at last made, the ratepayers may be changed, and it would be contrary to the principle applicable to such cases to make them pay those expenses incurred in previous years. On the other hand, if there are to be no back payments at all, the keeper of the asylum is left to depend solely on the liberality of government. Either view presents great difficulties; and had it been made obligatory to get an order within a reasonable time, such as twelve months, the difficulty would have been obviated. But the section must mean, either that the order shall include future maintenance only, leaving the past unprovided for, or maintenance from the time when the lunatic was sent to the asylum. I am inclined to take the latter view. It is to be observed, that in the latter part of s. 2, if the lunatic has property, it is clearly contemplated that the order should include back payments; and it is said the same principle should apply to an order upon the parish; but then arises the difficulty which the Lord Chief Justice has pointed out of contravening the principle against retrospective orders; and there has been a series of decisions, of which *Rex* v. *Maulden* (1) is an instance in point upholding that principle. In that case Lord Tenterden said: "The effect of a retrospective order is to bring on inhabitants who ought not to bear it a charge incurred during a former period." That applies equally strongly to the present case. Then he goes on: "It is quite unnecessary that the justices should have the power of making a retrospective order; for an order for the payment of a weekly maintenance might have been made as soon as the pauper was

(1) 8 B. & C. 78, 81.

placed in the asylum; and as there is not any necessity that the justices should have such power, and as no such power is expressly reserved to them, I am of opinion that they had it not." That does not apply so strongly in the present case, because the order need not be made by the two justices who certify the prisoner's insanity, and it cannot well be made until after the prisoner is sent to the asylum; and unless there is power to make a retrospective order, the keeper of the asylum has nothing but the benevolence of the Crown authorities to depend on. If I could have seen my way to a middle course, between allowing the whole of the back payments whenever the order is made and allowing none at all, I should certainly have adopted it; as it is, there is too much doubt in the matter to prevent me entirely concurring with or absolutely dissenting from the view my Lord has expressed.

As to the other point, I entirely concur; the effect of 26 & 27 Vict. c. 77, is to add a proviso to s. 35 of 11 & 12 Vict. c. 43, that s. 6 of that act shall apply to the cases otherwise excepted in s. 35.

MELLOR, J. I do not desire to add anything on the first point, as to which I agree with the rest of the Court. As to the second point, unless 26 & 27 Vict. c. 77, has the effect which my Lord has given to it, I do not see what object or effect it has. With reference to the other point, I confess that I feel constrained to differ. There must, ex necessitate, be expenses incurred which it is impossible can be at once paid until an order be obtained, and the order must therefore, as it appears to me, be to a certain extent retrospective in all cases. It could never have been intended to leave the keeper of the asylum to the equitable consideration of the Treasury in order to obtain this money; but the intention was, that when a lunatic criminal was removed all expenses of maintenance should fall on the parish of his settlement. The expenses of the inquiry and removal are preliminary, and must be incurred before the order is obtained; and I confess I do not feel the difficulty which weighs with the rest of the Court; I cannot help thinking that the word "maintenance" is large enough to include past as well as future, and I think it ought to be held to include all maintenance until the order is made, and that the justices have power to make the order, though it is so far retrospective. But

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then I think that the person applying for the order must apply promptly, if he wishes to be reimbursed his expenses, and if he continues to maintain the lunatic without taking any steps within a reasonable time he cannot be allowed to ask for an order for his expenses, and so contravene the clear principle of law, that the charges of one year cannot be thrown on the ratepayers of another. In the present case, therefore, I come to the same conclusion as the rest of the Court, that the order is bad, so far as relates to the past expenses of maintenance, on the ground that the keeper of the asylum cannot be allowed to lie by, and so throw the expenses of one year on the ratepayers of another year.

LUSH, J. The first question is, was the order made in time? The pauper, during his imprisonment, became insane, and was removed to a lunatic asylum, and the question is, whether the magistrates had power to make the order after the period of imprisonment had expired; and I cannot doubt that under s. 2 of 3 & 4 Vict. c. 54, they had the power, inasmuch as the prisoner is to be detained in the asylum until his recovery. Secondly, had the magistrates of the county jurisdiction to make the order when sitting within the borough? The 11 & 12 Vict. cc. 42, 43, primâ facie give this power by virtue of s. 6 of the later act; and I agree that 26 & 27 Vict. c. 77, had the effect of so far qualifying s. 35 of 11 & 12 Vict. c. 43, as to leave s. 6 to apply to the cases excepted in s. 35, though no other part of the act is to apply to the excepted cases. Therefore, the magistrates of a county sitting in a borough may lawfully make this order, though it be an order with respect to a lunatic. There remains the most material question, whether the order is good as to the expenses of past maintenance. I agree with the Lord Chief Justice, that the language of s. 2 of 3 & 4 Vict. c. 54, is prospective only; and I am unable to see my way to putting any qualifying words upon the language of the act. [The learned judge read the material parts of the section.] The words may mean an order for the whole of the maintenance, past and future (it having been determined that the order may be made at any time); and the question is, do they mean the whole or only the future maintenance? If they extend to the past there is no limit; and I am unable to agree with my

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Brother Mellor, that the order might be made for part only of the past expenses, inasmuch as the power is unlimited, and if it can be made for any of the past expenses of maintenance, it may be made for the whole. Primâ facie, a rate cannot be made on the rate-payers of to-day to pay debts incurred five years ago; and on this principle I cannot so interpret the statute as to enable this to be done by a retrospective order, unless there are clear words indicating such an intention. I therefore feel bound, in the absence of such words, to say that the act contemplates a prospective order only as to the expenses of maintenance; and the result is, that the order is bad so far as it relates to the past maintenance.

Judgment accordingly.

Attorney for appellants: *G. L. P. Eyre, for Beaven, Bradford-on-Avon.*

Attorneys for respondents: *Merriman & Pike, for W. C. Merriman, Marlborough.*

ROSSI *v.* BAILEY.

July 3.

Debtor and Creditor—Composition Deed, Protection of, where not pleaded—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 197, 198.

A debtor, who had executed and registered a deed of composition under s. 192 of the Bankruptcy Act, 1861, containing a release, was sued by a non-assenting creditor for a debt due before the execution of the deed. The debtor neglected to plead the deed, and the creditor obtained judgment and issued execution:—

Held, that, as the debtor might have pleaded the deed, he was estopped from setting it up afterwards to defeat the execution under s. 198.

THE plaintiff, having obtained judgment in an action on two bills of exchange, issued a fi. fa., which was levied on the 1st of May. The defendant applied at chambers, under 24 & 25 Vict. c. 134, s. 198, that the sheriff be ordered to withdraw from possession, on the ground of the defendant having executed and registered a deed of composition under s. 192. This being resisted by the plaintiff, Hannen, J. made an order that the sheriff should withdraw on the amount of the levy being paid into court by the defendant, which amount should be paid out to the plaintiff, unless

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the defendant should apply to the Court within the first four days of Trinity Term.

The defendant accordingly obtained a rule calling on the plaintiff to shew cause why the sum of 49*l.* 15*s.* 3*d.* paid into court by the defendant should not be repaid out of court to him or his attorney, on the ground that the deed of composition was complied with, and that the defendant was not bound to plead his deed.

The facts of the case as disclosed in the affidavits, the arguments of counsel, and the cases cited, sufficiently appear in the judgment of the Court.

June 9. *R. G. Williams* shewed cause.

Littler supported the rule, and, in addition to the cases noticed by the Court, relied on the case of *Ames* v. *Colnaghi.* (1)

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Blackburn and Lush, JJ.) was delivered by

BLACKBURN, J. In this case it appears by the affidavits that the defendant, on the 27th of February, executed a composition deed, which was assented to by the requisite number of his creditors, and was duly registered on the 10th of March, 1868. The deed contained a covenant to pay a composition of 4*s.* in the pound, to be paid by three instalments at five weeks, two months, and three months from the date of the deed, to be secured by the debtor's promissory note at those dates, such notes to be delivered to the creditors within fourteen days after the date of the deed. It contained a release on the part of the creditors, subject to a proviso that in case, inter alia, default should be made in payment of any of the said promissory notes at maturity, the release therein contained should thenceforth be at an end and void.

The plaintiff was before and on the 27th of February holder of two dishonoured acceptances of the defendant, and he did not assent to the deed.

On the 15th of April, after the first instalment was payable, the present action was commenced to recover the amount of these two

(1) Law Rep. 3 C. P. 359.

bills. The affidavits are very conflicting, but upon the whole it appears that the defendant had tendered payment of the first instalment on one of those bills, which was for 14*l.* odd, and, consequently, was in a position to support a plea founded on the deed as to that bill, but that he had not tendered payment of the instalment in respect of the other bill, which was for 27*l.* odd, and consequently could not have supported a plea founded on the deed as to that bill. He did not plead it as to either. Judgment was signed as to both, and execution issued, and the goods of the defendant were seized on the 1st of May. No leave to make the execution available was obtained from the Court of Bankruptcy.

Hannen, J., at chambers, made an order that on the amount of the levy being brought into court the sheriff should withdraw, and that if no application were made to the Court within the first four days of last Trinity Term, the amount should be paid out to the plaintiff, and the defendant should pay the costs of the application.

The defendant obtained a rule to shew cause why the money should not be paid out to him; against which cause was shewn during last term, when the Court took time to consider.

On the view which we take of the facts as disclosed by the affidavits, the question as to the portion of the money which represents the 14*l.* bill is that on which the Court of Exchequer was equally divided in *Staffordshire Banking Company* v. *Emmott* (1), whether the defendant who might have pleaded the deed, and has neglected to do so, can make use of it to prevent the execution being made available against his goods.

As to the residue of the money, the further question arises whether the defendant can use the deed to prevent the execution being made available, even though it appear that from his failure to fulfil the stipulation of the deed at the commencement of the action, the release contained in the deed no longer bound the plaintiff. Both questions depend upon the true construction of ss. 197 and 198 of the 24 & 25 Vict. c. 134. By s. 197, from and after the registration, "the debtor and creditors, and trustees, parties to such deed, or who have assented thereto or *are bound* thereby, shall in all matters relating to the estate and effects of

(1) Law Rep. 2 Ex. 202.

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such debtor, be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy," &c.

There is great difficulty in applying this enactment to the case of a deed which does not appoint trustees, and does not deal with any of the effects of the debtor. Still, the terms of the enactment indicate that the object of the legislature was to put the debtor in the same position as if the creditor bound by the deed had proved his debt, and (by implication though it is not expressly said) the debtor had obtained his discharge in bankruptcy.

The effect of a bankruptcy is regulated by the unrepealed provisions of the Bankrupt Act, 1849 (12 & 13 Vict. c. 106), and the preceding provisions of the Bankrupt Act of 1861, relating to this subject. So soon as the trader becomes a bankrupt, all that was formerly his property becomes the property of his assignees, and until his certificate under the old law or his discharge under the new law, there is no property that could be taken in execution under a fi. fa. or other execution against him. His person is protected on the principle that he is in the nature of a witness coming to attend a court of bankruptcy, and therefore by 12 & 13 Vict. c. 106, s. 113, he is to be discharged, with a penalty of 5*l.* a day on the officer detaining him on production of his protection, not merely from arrest under judgments for debts proveable under the bankruptcy, but from all arrests, though the judgment might have been obtained after the bankruptcy in respect of some cause of action not affected by the bankruptcy, such as a debt contracted after the petition: *Wallinger* v. *Gurney*. (1) But on his obtaining his certificate under the old law or his discharge under the new act, this protection ceased; and as the bankrupt then might acquire property of his own, it became necessary to make provision for the protection of his person and property after his discharge. The provisions now in force are contained in 24 & 25 Vict. c. 134, ss. 161, 162. (2)

(1) 11 C. B. (N.S.) 182; 31 L. J. (C.P.) 55.

(2) Section 161:—"The order of discharge shall, upon taking effect, dis-

These provisions are in substance the same as those contained in the previous bankrupt acts. They provide expressly for the summary relief of a bankrupt whose person has been taken in execution on a judgment for a debt barred by the order of discharge, if the judgment was before the order of discharge, so that he could not have pleaded his discharge to prevent it. They contain no provisions for the summary relief of a bankrupt whose after acquired property has been taken in execution under a fi. fa., on such a judgment; but it has been decided under the repealed acts that the courts would in such a case summarily interfere to prevent their process from being abused, without putting the bankrupt to his audita querela: *Davis* v. *Shapley*. (1) But when the judgment is not obtained at the time of the discharge, the statute gives the bankrupt a short form of plea; and it was decided in *Todd* v. *Maxfield* (2), that where the bankrupt had had the opportunity to plead his certificate to prevent the judgment, and had not used it, he was not entitled to use it subsequently in order to defeat the judgment.

We cannot find that the principles laid down in these cases have been overruled or departed from, or altered by subsequent legislation, and we think it may safely be said that the bankrupt's person before his discharge is absolutely free from arrest, so long as he has his protection order; and after his discharge both his person and his property are to be summarily relieved from execu-

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charge the bankrupt from all debts, claims, or demands proveable under his bankruptcy, save as herein otherwise provided; and if thereafter he shall be arrested, or any action shall be brought against him for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and the order of discharge shall be sufficient evidence of the bankruptcy, and the proceedings precedent to the order of discharge."

Section 162:—"If a bankrupt, after the order of discharge takes effect, be arrested or detained in custody for a debt, claim, or demand, proveable under his bankruptcy, where judgment has been obtained before the order of discharge takes effect, the court or a judge of a superior court of law shall, on proof of an order of discharge, and unless there appear good reason to the contrary, direct the officer who has the bankrupt in custody, to discharge him, which shall be done accordingly without fee."

(1) 1 B. & Ad. 54.

(2) 6 B. & C. 105.

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tion, on any judgment obtained before the order of discharge takes effect, in respect of a debt, claim, or demand, proveable under the bankruptcy; but if the judgment is not obtained till after the discharge takes effect, he must plead in the form given in the statute, and if he omits to do so loses his protection; and, lastly, where the judgment is for a cause of action not proveable under the bankruptcy, he has no protection at law either to his person or property. And we cannot doubt on reading the 197th section of the Act of 1861, that the object of the legislature was to give the debtor who had registered a valid deed an analogous protection and no more. But, unfortunately, those who framed the act, in drawing up s. 198, have used words so unhappily chosen as to produce great difficulty in construing them. They enact that "after notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property, in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available without leave of the court (that is of bankruptcy); and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the court shall be available to the debtor for all purposes as a protection in bankruptcy." In their literal sense these words apply to all process in respect of debts, even though the debts should have been contracted after the registration of the deed; and the latter part of the clause would protect the person of the debtor from all executions, even though not for debts at all. But the legislature never could have intended this, and the words must be restrained to debts affected by the deed. And it has been decided in *Williams* v. *Rose* (1) by the Court of Exchequer, and in *Dignam* v. *Baily* (2) by this Court, that a sheriff was liable to an action for an escape who discharged the execution debtor taken under a ca. sa., on the production of a certificate of the registration of a deed previous to the date of the judgment. In both these cases the *debt* in fact accrued after the registration; but as the sheriff had no means of ascertaining the date of the cause of action (though the ca. sa. gives him the date of the judgment) it would

(1) Law Rep. 3 Ex. 5. (2) Ante, p. 178.

appear that on the principle laid down in *Lloyd* v. *Harrison* (1) the sheriff would have been excused in obeying the certificate, if the protection applied to any judgment obtained after the registration of the deed. It could never, we think, be the intention of the legislature that if the officer detained the debtor on such an execution, and it turned out that the debt in respect of which the judgment was given, was in fact contracted before the execution of the deed, he should be liable to a penalty of 5*l.* a day, and that if he obeyed the protection he should be liable to an action for an escape, if it turned out that the debt had been contracted after the execution of the deed, there being no means whatever by which that fact could be ascertained by him. It seems to us, therefore, that these two decisions can only be supported by holding, that the debtor, not having availed himself of the deed by pleading it, so as to prevent the judgment, is, as against the officer at least, precluded from availing himself of the certificate as a protection in bankruptcy; and this goes a great way towards establishing that he cannot make use of it as against the creditor.

The present case, however, falls within the first branch of the section, and it is well to examine the authorities as to that. In *Whitmore* v. *Wakerley* (2) the deed was registered on the 9th of December, and judgment signed on the 20th of December, under which the debtor's goods were seized. The Court of Exchequer gave this brief judgment: "We are all of opinion that as the defendant did not plead the deed when he had the opportunity, he cannot avail himself of it now." This is directly in point, and an authority in favour of the plaintiff. But in *Hartley* v. *Mare* (3) the Court of Common Pleas decided the other way. It is true that it appears that the case of *Whitmore* v. *Wakerley* (2) (which had not then been reported) was thought by them to be no more than a decision that a fi. fa. could not be set aside, not that it might be made available; and it is also true that the form of the proceeding was an interpleader under which the inspectors claimed the goods as their property, just as the assignees of a bankrupt would do in a case of execution before the order of discharge. But though these

(1) Law Rep. 1 Q. B. 502. 12 Jur. N.S. 701 (3) 19 C. B. (N.S.) 85; 34 L. J. (C.P.) 187. 11 Jur. N.S. 626
(2) 3 H. & C. 538; 34 L. J. (Ex.) 83. 11 Jur. N.S. 182.

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observations may diminish the weight of the authority, it still seems clear that the Court of Common Pleas thought, that though the debtor had had the opportunity to plead the deed, he, as well as the inspectors, might afterwards use it to prevent the execution being available. In *Braun* v. *Weller* (1) the special circumstances rendered it "unnecessary in this case to determine whether under any circumstances the omission to plead in bar to an action deprives the defendant of any benefit to which he may be entitled under the provisions before referred to, and to be found in ss. 192—198, inclusive, of the act."

In this state of the decisions the point was brought before the Court of Exchequer in *Staffordshire Banking Company* v. *Emmott* (2), and the Court was equally divided in opinion. We must therefore decide the point for ourselves, without being fettered by authority, though knowing that whichever way we decide we have learned opinions of equal weight with us and against us.

After carefully considering the reasons given by the learned Barons, we have come to the conclusion that this rule should be discharged. We agree with Channell, B., that the general rule of law is that the party who might have pleaded and prevented a judgment, and did not, is estopped from afterwards raising that defence, and that as the legislature might have enacted that this doctrine of estoppel should not apply, the real question is whether they have so enacted. And we think they have not. We can find no words expressing an intention so to enact, and as the effect of such an enactment would be to place a debtor executing a deed in a very much better position than a bankrupt who has obtained his order of discharge, we think the legislature cannot be taken to have intended so to enact. We think also, as already intimated, that the cases of *Williams* v. *Rose* (3) and *Dignam* v. *Baily* (4) will be quite consistent with the principle laid down in *Lloyd* v. *Harrison* (5) if we hold that, the sheriff, seeing by the certificate the date of the registration, and by the ca. sa. the date of the judgment, is affected with notice that the debtor, if he was entitled to plead the deed, did not do so, and that this is enough

(1) Law Rep. 2 Ex. at p. 188.
(2) Law Rep. 2 Ex. 208.
(3) Law Rep. 3 Ex. 5.
(4) Law Rep. ante, p. 178.
(5) Law Rep. 1 Q. B. 502.

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to prevent him from availing himself of it. But if we decided that the protection is to be available whenever the debt is in fact one to which the deed applies, that being a fact which the sheriff has no means of knowing, we think we should, if we did not overrule these two cases, at least render them very questionable: as they would then seem to be in conflict with the principle laid down by the Exchequer Chamber in the case of *Lloyd* v. *Harrison*. (1)

We are therefore of opinion that the rule should be discharged altogether, and it is unnecessary to inquire whether there is any distinction between the two bills.

Rule discharged.

Attorney for plaintiff: *S. Copping.*

Attorney for defendant: *R. Wood.*

THE QUEEN *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF TEWKESBURY.

June 13.

Municipal Corporation—Election of Town Councillor—Disqualification of Candidate—Knowledge by Elector of Disqualification.

At the election of town councillors in a borough not divided into wards, there were four vacancies and five candidates. B., one of the four who had a majority of votes, was the mayor, and acted as returning officer, and was therefore incapable of being elected:—

Held, that the mere knowledge on the part of the electors who voted for B. that he was mayor and returning officer, did not amount to knowledge that he was disqualified in point of law as a candidate; and therefore their votes were not thrown away, so as to make the election fall on the fifth candidate.

MANDAMUS against the defendants, commanding them to permit Edward Moore to vote and act as one of the councillors of the borough of Tewkesbury duly elected and qualified to serve that office.

Upon the return to the writ, the following case was stated by order of the Court and consent of the parties:—

1. The borough of Tewkesbury is one of the boroughs named in schedule A. of 5 & 6 Wm. 4, c. 76, and has a mayor, four aldermen, and twelve councillors. There are no wards in Tewkesbury.

2. On the 1st of November, 1866, one-third part, namely, four of the councillors who had been longest in office without re-election,

(1) Law Rep. 1 Q. B. 502.

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went out of office, among them being one George Blizard, and on the same day an election was held to supply their places.

3. George Blizard was, on the 1st of November, 1866, the mayor and returning officer of the borough, and was entitled to hold and exercise that office until the 9th of November, 1866, and until his successor should have been duly appointed and should have accepted the office. Mr. James Francis Prosser was before and on the same 1st of November the deputy mayor (appointed by George Blizard), and Charles Fisher and George Watson were the assessors of the borough. No person was appointed by the town council to act as substitute for the mayor as returning officer at the election pursuant to s. 36 of the act, and the election was held before the mayor, deputy mayor, and assessors. The mayor presided personally as returning officer at the election during about two hours of the time of polling, but he was not present at the opening of the poll, nor for about a quarter of an hour thereafter. The poll was opened at 9 o'clock in the morning, and closed at 4 o'clock in the afternoon.

4. At the election there were five candidates duly nominated, namely, George Blizard, William Grafton Kealing, John Henry Boughton, Richard Rice, and Edward Moore; the four first-named polled 312 votes each, and Edward Moore polled 143 votes. George Blizard permitted himself to be nominated as a candidate at the election, and to be re-elected as a councillor of the borough, and voted for himself in such election, and as mayor he presided thereat during the portion of the day in person, and received voting papers on behalf of himself and the other candidates.

5. At a quarter before nine in the morning of the day of the election, and before the opening of the poll, Frederick Moore, on behalf of Edward Moore, attended at the town hall of the borough, and then and there served upon the deputy mayor, who was about to preside at the election by the appointment and on behalf of George Blizard, and upon the two assessors, in the presence of the town clerk, the following notice in writing:—

"To Mr. George Blizard, mayor of the said borough, and Mr. James Francis Prosser, his deputy, and to Messrs. Samuel Philpot Brooks and Charles Fisher, assessors of the said borough, and to their respective deputies.

"I hereby give you notice that the said George Blizard, one of the persons nominated for the office of councillor at this present election, being the present mayor of the said borough, is disqualified for the office of councillor, and ineligible to be nominated or elected a councillor of the said borough during the time of his mayoralty, and therefore that all votes given to the said George Blizard will be thrown away.

"And I give you further notice not to receive or record any votes tendered for the said George Blizard.

"EDWARD MOORE,

"A burgess of the borough, and a candidate for the office of councillor at this election."

6. Within half an hour after the opening of the poll a written copy of the above notice was served by Frederick Moore upon George Blizard, who nevertheless proceeded to the town hall, and, alternately with his deputy, presided throughout the day at the election.

7. About half-past nine o'clock on the morning of the day of the election Edward Moore caused printed copies of the following notice to be posted on the outside of the town hall, in which the election was held, on the public market-place in the borough, and in various other conspicuous parts of the borough, and in all which places, except the town hall, they remained legible to passers-by throughout the day. He also caused other printed copies to be exhibited and carried on boards during the remaining hours of polling through the public streets of the borough, and other copies to be distributed generally at various shops and houses throughout the borough. The notice posted outside the town hall was taken down by the orders of a magistrate some short time after it had been put up, and was not afterwards restored.

"To the burgesses of the borough of Tewkesbury.

"I hereby give you notice that Mr. George Blizard, one of the persons nominated for the office of councillor at this present election, being the present mayor of the said borough, is disqualified for the office of councillor, and ineligible to be nominated or elected a councillor of the said borough during the term of his mayoralty, and therefore that all votes given to the said George Blizard will be thrown away. "EDWARD MOORE."

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8. Mr. Ralph Chandler and Mr. William Kinson, on behalf of Edward Moore, attended at the place of polling, Mr. Chandler during a part and Mr. Kinson during the whole time of polling; but no verbal notice was given, nor was any written or printed notice, other than the notice as aforesaid, made visible, or shewn to, or served on the voters tendering their votes for George Blizard at the election. Several persons recorded their votes at the election before the printed notice had been made public.

9 & 10. On the day of the election, and after he had received the notice mentioned in paragraph 5 of this case, George Blizard, whilst he was presiding over the election as mayor, produced and publicly exhibited in the town hall, where the election was being held, a printed copy of the following address, and afterwards caused printed copies of the same to be issued and distributed among the burgesses during the hours of polling :—

"Do not be deceived by the clap-trap notice this morning issued by Edward Moore, which is on a par with the one served by the same aspiring individual upon Mr. Francis Thomas after the election of guardians. Rest assured that when elected, which I am certain to be, I shall very confidently take my seat quite indifferent as to the puny efforts of my adversary to deprive me of it."

11. At the close of the election the deputy mayor and assessors examined the voting papers delivered in at the election, and at the time by law appointed declared the result of the election to be in favour of Blizard and the other three candidates who had a majority of votes.

12. An information in the nature of a quo warranto was afterwards exhibited against Blizard, and on the 15th of December, 1866, he disclaimed the office, and judgment of ouster was recorded against him. (1)

13. On the 29th of December, 1866, Edward Moore caused to be served upon the then mayor, and also upon the then town clerk of the borough, a notice demanding to be admitted to act as town councillor.

14. In pursuance of such notice Edward Moore attended the quarterly meeting of the town council of the borough on the 1st of January 1867, and claimed to be a town councillor, and to vote

(1) See *Reg.* v. *Blizard*, Law Rep. 2 Q. B. 55.

and act as such; but the town council then refused, and have since continued to refuse, to admit him.

The question for the opinion of the Court was, whether Edward Moore was duly elected a town councillor of the borough at the election held on the 1st of November, 1866.

Dowdeswell, Q.C. (*H. Matthews, Q.C.*, with him), for the prosecution. Blizard, being returning officer, was disqualified: *Reg.* v. *Owens* (1), *Reg.* v. *Blizard.* (2) The notice given by Moore was issued so early on the polling day that a jury would infer that almost every one who voted for Blizard voted with a knowledge of his disqualification; therefore their votes were thrown away. *Rex* v. *Hawkins* (3), is in point.

[BLACKBURN, J. That case is distinguishable, because the exact number was ascertained of those who voted for either party before the notice of disqualification was given; it is not stated in this case how many had voted for Blizard before the notice was published.]

At any rate every elector must have known that Blizard was mayor and returning officer, and therefore every one was bound to know that in law he was disqualified. Ignorantia juris, quod quisque scire tenetur, neminem excusat: Broom's Legal Maxims, p. 249, 4th ed. It appears from *Reg.* v. *Coaks* (4), that Moore is entitled to act as town councillor.

Powell, Q.C. (*H. James* with him), for the defendants, was not heard.

BLACKBURN, J. It is unnecessary to hear counsel for the defendants, because on the facts as stated in the case, we cannot order a peremptory writ to admit Moore to vote and act as town councillor. There were five candidates and four vacancies in the office of town councillor; amongst the candidates were Blizard, who was the mayor, and Moore. Blizard, as mayor of the borough, was the returning officer, and as such presided at the election. It is quite clear, on the authority of *Reg.* v. *Owens* (1), that a returning officer cannot return himself, and consequently Blizard was disqualified,

(1) 28 L. J. (Q.B.) 316; 2 E. & E. 86. 5 Jur. N.S. 704
(2) Law Rep. 2 Q. B. 55.
(3) 10 East, 211; 2 Dow, 124.
(4) 3 E. & B. 249; 23 L. J. (Q.B.) 133.

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and therefore could not be elected, although he had an actual majority of votes; and in *Reg.* v. *Blizard* (1), we granted a quo warranto to oust him. The question now is, whether Moore, who had the smallest number of votes, has been elected. The candidate for the office of town councillor is duly elected if he has an actual majority of valid votes; this was decided in *Rex* v. *Hawkins* (2), and it was also decided that if an elector, having notice of the disqualification of a candidate, chooses to vote for that candidate, it is the same thing as if he did not vote at all. From the illustrations in the cases, it is plain that if an elector knows as a fact that the candidate for whom he is about to vote is disqualified, and yet persists in voting for him, the elector's vote is as utterly thrown away as if he had voted for a dead person, or for the man in the moon. Does it appear in this case that those who voted for Blizard without knowing of his disqualification were a smaller number than those who voted for Moore? If it does, Moore is entitled to be declared duly elected; if it does not, then the election is void.

In appears in the case that the town council omitted to appoint a substitute, which *Reg.* v. *White* (3) shews to have been a proper course. It further appears from paragraph 7, that about half-past nine o'clock on the morning of the election, after the election had begun, notices were posted up on conspicuous places, informing the public that Blizard was disqualified from being a candidate for the office of town councillor during the term of his mayoralty. It is also stated in that paragraph that other steps were taken to bring that fact to the knowledge of the electors, but it does not follow that it was brought within their knowledge. Many of them probably could not read, and besides that a considerable number might not see the notice. Perhaps there was evidence from which a jury might have drawn the inference that those who voted after half-past nine might have had notice, but there was no direct evidence that they actually received such notice. The probability is that a large number had notice. But it is also stated in paragraph 8, that several persons had voted before any notice was given. From these statements it does not appear that an express

(1) Law Rep. 2 Q. B. 55. (2) 10 East, 211; 3 Dow, 124.
(3) Law Rep. 2 Q. B. 557.

notice of the disqualification was given to so many of those who voted for Blizard as to entitle Moore to be returned.

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It is therefore necessary to decide whether the mere knowledge of the fact that Blizard was the mayor and returning officer, must be taken to involve knowledge of his being disqualified for election. Every elector in the borough must have known that Blizard was the mayor, and every elector who saw him presiding at the election must have known as a fact that he was the returning officer, and every elector who was a lawyer, and who had read the case of *Reg.* v. *Owens* (1), would know that he was disqualified. From the knowledge of the fact that Blizard was mayor and returning officer, was every elector bound to know as matter of law that he was disqualified? I agree that ignorance of the law does not excuse. But I think that in *Martindale* v. *Falkner* (2), Maule, J., correctly explains the rule of law. He says: "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so. In *Jones* v. *Randall* (3), Dunning, arguendo, says: 'The laws of this country are clear, evident, and certain; all the judges know the laws, and knowing them administer justice with uprightness and integrity.' But Lord Mansfield, in delivering the judgment of the Court, says: 'As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is even in the last resort.' It was a necessary ground of the decision in that case that a party may be ignorant of the law. The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract. There are many cases where the giving up a doubtful point of law has been held to be a good consideration for a promise to pay money. Numerous other instances might be cited to shew that there may be such a thing as a doubtful point of law. If there were not, there would be no need of courts of appeal, the existence of which shews that judges may be ignorant of law. That being

(1) 28 L. J. (Q.B.) 316; 2 E. & E. 86.

(2) 2 C. B. at p. 719; 15 L. J. (C.P.) at p. 94.

(3) Cowp. at pp. 38, 40.

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so, it would be too much to hold that ordinary people are bound to know in what particular court such and such a practice does or does not prevail."

I take this to be the rule of law applicable to this case. I think the knowledge that Blizard was the mayor is clearly brought home to every voter, but the question is not merely whether every vote given for him was thrown away, in the sense that it was given for a disqualified candidate—in that sense it was undoubtedly thrown away; but whether it was thrown away in the same manner as if the vote had been given for a dead man, or had not been given at all. I think that where a voter is informed that a certain circumstance in point of law disqualifies a candidate, even although he may hold a different opinion, yet if he afterwards votes for that candidate, his vote is thrown away. In the present election a voter may possibly have been told by the one party that Blizard being returning officer could not be elected, by the other party that he could be; if this could be shewn the vote would be thrown away; but the case merely shews as a fact that Blizard was returning officer, from which a lawyer would be aware that he was disqualified, and, in my opinion, the knowledge that Blizard was returning officer does not in law necessarily involve the knowledge that he was disqualified. It must be observed that when a voter is said to have notice of disqualification in a candidate, the word notice is ambiguous. In *Rex* v. *Hawkins* (1), the question is thus stated: "If the law be that at the election of corporate officers, the votes given for an incapable candidate, after notice of such incapacity, are to be considered as thrown away, i.e., as if the voters had not given any vote at all, then this will be a good election of Spicer; unless the time when notice of his incapacity was given, viz., after two persons had given their votes for each of the candidates, can be considered as making any difference. The general proposition, that votes given for a candidate after notice of his being ineligible are to be considered as the same as if the persons had not voted at all, is supported by the cases of *Reg.* v. *Boscawen*, Easter, 13 Anne; *Reg.* v. *Withers*, Easter, 8 Geo. 2; *Taylor* v. *Mayor of Bath*, M. 15 Geo. 2; all which are cited in Cowper, 537, in *Rex* v. *Munday*. In the first, *Boscawen* v. *Roberts*, the two

(1) 10 East, at p. 217.

candidates had an equal number of votes; but because Boscawen was incapable, the votes given for him were considered as thrown away, and the other duly elected. In the second case, Withers had five votes out of eleven; and the other six refusing to vote at all, the Court held Withers duly elected, and that the six who refused to vote were virtually consenting to the election of Withers. In the third case, Taylor, Bigg, and Kingston were candidates. Bigg was objected to, as a disqualified person; notwithstanding which, Bigg had fourteen votes, Taylor thirteen, and Kingston only one. There Lee, C.J., at nisi prius, directed the jury that if they were satisfied that the electors had notice of Bigg's want of qualification they should find for the plaintiff (that was Taylor, who had only thirteen votes), because Bigg, not being qualified, was to be considered as a person not in esse, and the voting for him a mere nullity. The jury found for the plaintiff; and the Court, on motion for a new trial, agreed with the law as laid down by Lee, C.J., and refused a new trial." The whole of this reasoning goes to shew that those who voted for the disqualified candidate, knowing of his disqualification, were to be treated as voting for a person not in esse, so that there must be an actual knowledge of his disqualification in law. And Lord Eldon similarly grounds his decision on the fact that the majority knowingly voted for a disqualified candidate, or, as he terms it, "for a dead man." (1) Certainly he seems to have thought that the ratio decidendi was the knowledge of the disqualification in law, and that the votes given with that knowledge were mere nullities.

In *Reg.* v. *Coaks* (2) Lord Campbell, C.J., says: "Blake was, in fact, a candidate, but he was an alderman, and therefore ineligible, and that fact was known to the electors. Now, it is the law, both the common law and the parliamentary law, and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person; as it has been said, as if he gave his vote for the man in the moon." It seems to me that Lord Campbell's opinion was this:—The reason why the vote given for a dead man is not to be counted is that the voter knowingly votes for a person

(1) *Rex* v. *Hawkins*, 2 Dow, 124, 148.

(2) 3 E. & B. at pp. 253-4; 23 L. J. (Q.B.) at p. 136.

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whom he knows to be incapable of election, and therefore the result is the same as if he had not voted at all. Voting for a dead man, or for the man in the moon, are expressions shewing that, in order to make the vote a nullity, there must be wilful persistence against actual knowledge. But it does not seem to me consistent with either justice or common sense, or common law, to say that, because these voters were aware of a certain circumstance, they were necessarily aware of the disqualification arising from that circumstance, and that therefore their votes are to be considered as mere nullities. Upon this ground I do not think that the votes given in ignorance that Blizard was in law disqualified, are made out to have been wholly thrown away, and that Moore is entitled to act as town councillor.

Under these circumstances the election ought to be considered as void, and a new election ought to be held.

LUSH, J. I am of the same opinion. We have not the materials before us to enable us to find out whether the prosecutor had a majority over the legal votes given for his opponent, the notice of disqualification not having been published before the election commenced; therefore it becomes necessary to ascertain what is the principle governing the decisions in the cases cited, in which it was held that votes given for a candidate whom the voters know to be disqualified are thrown away, that is, are to be treated as if they had not been given at all. The fact that Blizard, who presided at the election, was mayor, was known to all the voters; and it is necessary to decide whether the vote, given by an elector who knows a fact which, by construction of law, operates as a disqualification of the candidate, is of itself a mere nullity, or whether, in order to nullify the vote, it is necessary that the elector should be aware not only of the fact, but also of the legal consequences annexed to it. For the reasons given by my Brother Blackburn I am of opinion that it is not enough to shew that the voter knew the fact only, but that it is necessary to shew sufficient to raise a reasonable inference that he knew the fact amounted to a disqualification. It cannot be said in all cases that the mere knowledge of a fact which, in law, disqualifies a candidate must be taken to be knowledge of all the accompanying circumstances. That would

be a step far beyond the principle in the cases cited, which shew that, in order to nullify a vote, it must be proved that the person giving it must have known that he was doing an act of no avail whatever. A maxim has been cited which, it has been urged, imputes to every person a knowledge of the law. The maxim is ignorantia legis neminem excusat, but there is no maxim which says that, for all intents and purposes, a person must be taken to know the legal consequences of his acts. Here the voter's ignorance of the disqualification of the candidate does not make his vote valid; but it is a very different question whether we are to say now that the candidate who was in the minority is to be declared duly elected, and that those persons who voted for Blizard must be taken to be in the same position as if they had not voted at all, merely because they knew the fact from which, by construction of law, the disqualification arose. Therefore, I am of opinion that the mandamus cannot issue.

Judgment for the defendants.

Attorney for prosecution: *Norcutt.*

Attorney for defendants: *Badham, for Winterbotham, Tewkesbury.*

HOLFORD, APPELLANT; GEORGE, RESPONDENT.

June 6.

Salmon Fishery Acts, 1861 *and* 1865 (24 & 25 *Vict. c.* 109; 28 & 29 *Vict. c.* 121) —*Fixed Engines—Putchers—Stop-nets—Immemorial Usage—*2 *Hen.* 6, *c.* 15, *Interpretation of.*

By s. 11 of 24 & 25 Vict. c. 109, no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters . . . but the section shall not affect any ancient right or mode of fishing lawfully exercised, at the time of the passing of the act, by any person, by virtue of any grant, or charter, or immemorial usage. By the interpretation clause "fixed engine" includes "putchers;" and by s. 39 of 28 & 29 Vict. c. 121, "fixed engine" in the former act includes "any net fixed to the soil, or made stationary in any other way."

The owner of a several fishery in the navigable and tidal river Severn claimed a right to use putchers and stop-nets (which it was admitted were fixed engines within s. 39 of 28 & 29 Vict. c. 121), for the purpose of catching salmon. The putchers and stop-nets had been in use for forty-five years up to 1862; there was no evidence of previous user, nor was there any evidence to the contrary. The commissioners having found the putchers and stop-nets illegal:—

Held, that the user for forty-five years did not raise a conclusive presumption

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of law that the putchers and stop-nets had been used from time immemorial and were not of recent origin.

Held, also, that the statute 2 Hen. 6, c. 15, prohibits not only the use of nets which are permanently fixed day and night, but also those which are fixed for intervals of time only, if they obstruct the navigation of a river and the passage of fish.

CASE stated by the Special Commissioners for English Fisheries pursuant to the Salmon Fishery Amendment Act, 1865, which (s. 45) incorporates 20 & 21 Vict. c. 43.

2. By the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 11, it was enacted that no fixed engine of any description should be placed or used for catching salmon in any inland or tidal water, and there was added the following proviso: "But this section shall not affect any ancient right or mode of fishing, as lawfully exercised at the time of the passing of this act, by any person by virtue of any grant, or charter, or immemorial usage." The fixed engines thus saved from the operation of s. 11 were declared by the subsequent statute, 28 & 29 Vict. c. 121, s. 39, to be privileged fixed engines.

3. By the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 40, the special commissioners for English fisheries were authorized to inquire into the legality of all fixed engines erected or used for catching salmon within the limits of the Salmon Fishery Acts, 1861 and 1865, to abate and remove all such as were not proved to their satisfaction to be privileged. By s. 44, on the appearance of the owner or other persons for or against any fixed engines, and after hearing what was alleged by him or them, or on his or their behalf, the commissioners were authorized to decide as to the legality or illegality of the fixed engines; and in the event of their decision being in favour of the illegality of any engine, they were authorized by warrant under their hands to order the owner to abate and remove the same.

4. By s. 39 of 28 & 29 Vict. c. 121, it was provided that whereas the 24 & 25 Vict. c. 109, s. 11, exempted only from the section last mentioned such fixed engines as were in use for catching salmon during the open season of 1861, and inasmuch as in certain cases fixed engines in use during the four years previous to 1861, or one of such years, might from temporary causes have been

out of use during the year 1861, and it was expedient to provide for such cases, it was thereby declared that if any fixed engines not in use in 1861 was in use during one of the previous four years, proof of its user during one of such four years might be substituted for proof of its user during 1861, so nevertheless that no person should be proving the use of different fixed engines during the said years, be entitled to a number of privileged engines exceeding the greatest number of such engines in use by him during some one of the five years from 1857—1861.

5. The Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), by s. 2, is to be read as one with the Salmon Fishery Act, 1861; and by s. 4 of 24 & 25 Vict. c. 109, "fixed engines shall include stake, nets, bag-nets, putts, putchers, and all fixed implements or engines for catching or for facilitating the catching of fish;" and by 28 & 29 Vict. c. 121, s. 39, "fixed engines shall in this act, and in the Salmon Fishery Act, 1861, include any net, or other implement for taking fish, fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing mill-dam."

6. At the hearing of the claim before the commissioners at Gloucester the appellant made three claims: (1), to 350 putchers at Hope Pill; (2), to three stop-nets at Hope Pill; (3), to 130 putchers at Hock Crib—all situate between high and low water mark in the river Severn, and within the manor of Arlingham, as being privileged fixed engines within the meaning of the above statutes.

7. The manor of Arlingham is within, or once formed part of, the great manor or barony of Berkeley, granted by a charter of King Henry II. to Maurice of Berkeley; and it is admitted that several ranks of putchers and stop-nets had been proved before the commissioners to have been legally used from time immemorial at certain places within the great manor of Berkeley.

8. In proof of the legality of the putchers and stop-nets claimed by the appellant he gave in evidence a feoffment dated the 20th of November, 1610, by which the then owner of the great manor of Berkeley conveyed the manor of Arlingham (which, as hereinbefore stated, had been part of the manor of Berkeley) to Thomas Yate, through whom the title had passed to the appellant by mesne conveyances. The feoffment in the parcels described the

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lands as "All that the manor of Arlingham, with its appurtenances, and all that free fishing and several fishing in the river Severn, over, against, and so far as the manor, parish, or village of Arlingham extends, and also all those the liberties and franchises of free fishing, &c."

9. There was no more specific description in such conveyance of a fishery in the Severn as appurtenant to the manor of Arlingham, within which manor the sites of the fixed engines were.

10. There was no specific mention in any of the documents of title of putchers or stop-nets, or other fixed engines in connection with such fishery.

11. At the place where the manor of Arlingham abuts on the left bank of the Severn the river is a navigable tidal river or estuary, and is about half a mile wide between high-water mark on either side. It was admitted that the manor of Arlingham was bounded on one side by the medium filum aquæ of the Severn.

12. As to the putchers and stop-nets at Hope Pill (which is higher up the river than Hock Crib), it had also been proved by a witness who was sixty years old, who had been lessee of the lord of the manor of the fishing here, and whose father had been lessee from the year 1825 till he himself became a lessee, that he remembered the fishery since he was ten years old, that is to say, for forty-five years prior to 1861; that putchers and stop-nets were used at Hope Pill on the same sites as at present during the whole of that time, and were there in use when he first knew or could recollect the fishery; and that when he was ten years old one Cooke was tenant of the fishery, but whether Cooke used such putchers before that date, no evidence was given. With respect to the putchers at Hock Crib, a witness who was fifty-seven years old, said that twenty-five years ago he was, for the first time, employed at and knew the fishery there, that there were old stakes then on the same site, which he filled up with putchers.

13. The witnesses stated that in 1861 the number of putchers used was, at Hope Pill 350, at Hock Crib 100, and three stop-nets at Hope Pill.

14. It was proved that the mode in which putchers were used was as follows:—On the shore, between high and low water mark, double rows of stakes, each stake being about twelve feet long and

eight inches thick, are driven into holes cut in the rock a depth of from one to two feet, and the rows are in a direction at right angles to the current. By means of cross-poles fastened to these upright stakes, partitions are made of sufficient size and depth to contain the putchers, which are laid horizontally, and all touching each other, each putcher being kept fixed in its position by means of the stakes and cross-poles. A putcher is a conical or funnel-shaped basket, made of twenty straight rods fastened together at intervals by four or five hoops of decreasing size, each rod about half an inch or an inch thick, and about five feet long, and running lengthways from end to end of the basket. The length or depth of the basket is about five feet, the diameter about twenty inches at the mouth (where one end of each rod is fastened to the largest hoop at intervals of three inches), and two or three inches at the other end. The framework is loose or open, and the mouth and end are open so as to offer as little resistance to the tide as possible. These putchers, when put in position, lie on their side in tiers three or four deep, and to one who stands in front of them they appear like a honeycomb, the mouths all facing one way, either facing the flood tide or the ebb tide: a rank of putchers means a row consisting of several tiers, the length of the rank varying with the number of the putchers used, and the whole of the stakes and putchers together forming a structure sufficiently stable to resist the action of the tide. A salmon is caught by going into one of the putchers with some force, when its head becomes wedged in the small end of the putcher, and it is kept there fixed till the ebb of the tide allows the fisherman to go and take the fish out. These putchers are fixed annually during such portion of the year as they may be lawfully used to catch salmon, the stakes remaining permanently. Putchers are only calculated to catch large fish, and not eels, shrimps, or the fry of fish.

15. It was proved that the mode in which the stop-nets were used was as follows:—A stake is driven into the shore near high water mark, and a rope attached to it which is run out towards the bed of the estuary nearly at right angles to the line of the shore, and the further end of the rope is fixed by an anchor in the soil of the bed of the river. The boats are each attached to this rope, which is used to steady them. The number of boats which

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may be used on one rope depends on the length of the rope. When the boat is thus steadied by the rope a net is used in combination with each boat in the following way:—The net is so placed that the body of it lies across and under the boat, the mouth of the net, which is about fifteen feet wide, facing the tide on one side of the boat, and the tail or end of the net stretching under and beyond the other side of the boat. By a combination of poles the mouth of the net is kept a few feet under the surface of the water, and the fisherman holding a string attached to the tail of the net in his hand feels when a fish enters the net, and immediately jerks the mouth of the net up and out of the water to prevent the escape of the fish, and which he then takes out.

17. At the hearing it was contended on the part of the appellant—First: That under the above circumstances he had proved, and the commissioners ought to hold, that the putchers and stop-nets were privileged under 24 & 25 Vict. c. 109, s. 11, which provides that the section shall not affect any ancient right or mode of fishing exercised at the time of the passing of the act, by virtue of any grant or charter or immemorial usage, and that the commissioners ought to certify to that effect. Secondly: That the commissioners were at liberty and ought to presume, and a judge would and ought to have told a jury to find, that there was a right to use putchers and stop-nets generally within the great manor of Berkeley, and the manor of Arlingham as part thereof, and that it was not necessary that they should have been always at the particular spots where now used. Thirdly: And that even if this were not so, the commissioners were at liberty and ought to hold, and a judge would and ought to have told a jury to find, that there was a right to use them at the particular spots, either by grant or charter or immemorial usage.

18. On the other hand, it was contended on the part of the respondent that there was no sufficient evidence of the legality of the putchers and stop-nets; that only forty-five years user prior to 1861 had been proved as to some, and twenty years user prior to 1861 as to the rest; that in the statute 1 Eliz. c. 17, and 18 Geo. 3, c. 33, putchers were not mentioned as then existing, and the reasonable inference was that they had begun to be first used in very recent times, and were illegal.

19. The commissioners found as facts that the putchers and stop-nets claimed at Hope Pill, had been continuously used since 1816 at the places in question; that the putchers at Hock Crib had been continuously used there since 1841. But there was no evidence one way or the other as to any prior user respectively.

20. The commissioners were of opinion that inasmuch as Magna Charta had prohibited a several fishery being created since that date, and also Magna Charta and subsequent statutes (Magna Charta, 9 Hen. 3, c. 23; 25 Edw. 3, stat. 4, c. 4; 45 Edw. 3, c. 2; 1 Hen. 4, c. 12; 4 Hen. 4, c. 11; 12 Edw. 4, c. 7), repeatedly prohibited weirs or kiddles being made or enhanced in navigable rivers, the only ground on which the fixed engines called putchers could be legal was on the presumption that the Crown had granted before Magna Charta the right to use such fixed engines. That in like manner the use of fixed nets involved a several fishery at the place where they were used; that such several fishery could only have been legally created before Magna Charta, and that the fixed nets themselves had been expressly prohibited by the statute 2 Hen. 6, c. 15 (1), and no fixed net could be legal which had not been lawfully used before the date of the statute last mentioned. The commissioners found that though there was evidence from which they might reasonably presume that a several fishery had been legally created before Magna Charta, still as no grant was produced they could only infer from the subsequent user what the terms of that grant were. That taking the documentary evidence of a general grant of several fishery with the proved use of putchers and stop-nets at Hope Pill for only forty-five years previous to 1861 and a proved use of putchers for only twenty years previous to 1861 at Hock Crib, they could not reasonably presume that a grant of the Crown to use putchers at the places in question existed, nor that a grant of the Crown to use stop-nets existed, nor that they were lawfully used before the statute 2 Hen. 6, c. 15. They were further of opinion that the statute 24 & 25 Vict. c. 109, s. 11, did not create any new right, but merely saved such rights as were legal before that date. Therefore they found that the putchers as well as the three stop-nets claimed were illegal, and ordered them to be abated and removed.

(1) See this statute, post, p. 648, n.

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The question for the opinion of the Court was, whether on the evidence the commissioners ought to have presumed and found that the putchers and stop-nets, or any of them, were lawfully exercised in 1861, by virtue of any grant or charter or immemorial usage.

Sir J. B. Karslake, A. G. (*Sir W. B. Brett, S. G.*, and *Archibald* with him), for the respondent. The putchers and stop-nets are not privileged engines under s. 11 of 24 & 25 Vict. c. 109, unless it can be presumed that they were in existence before Magna Charta. The question is, whether the commissioners on the evidence stated in the case were bound to presume as matter of law that the appellant's right to use them had so existed. Section 41 of 28 & 29 Vict. c. 121, provides that where a claim is made that a fixed engine is privileged, the commissioners shall, on proof given to their satisfaction that such engine is privileged, certify to that effect, stating in the certificate the situation, size, and description of the engine; the certificate is to be deemed an order of the commissioners, and to be subject to appeal. And by s. 11 of 24 & 25 Vict. c. 109, that section is not to affect "any ancient right or mode of fishing as lawfully exercised by grant, charter, or immemorial usage." The commissioners, therefore, have to find not only that the privilege and mode of fishing is now exercised, but that it is now exercised in the same manner as it was before the time of Edward I.: see 25 Edw. 3, stat. 4, c. 4. That putchers were used in other places of the manor of Berkeley, is no evidence that they had existed at the spot where they are now fixed. This is clear from the dictum of Willes, J., in *Rawstorne* v. *Backhouse*. (1) He says:—"If the Crown had before Magna Charta granted a fishery with a right to put kiddles in various parts of it, what would have been the effect of the first statute against weirs, kiddles, &c., which excepted only those existing before the time of Edward I.? The grant of the Crown could not override the statute, and I presume it would have been illegal for the fishers to place kiddles anywhere except where they were at the time the statute was passed." The commissioners are not bound, therefore, to draw the inference that the putchers and stop-

(1) Law Rep. 3 C. P. at p. 77.

nets are of the same sort, size, and description, and are used in the same spot, as those which may have been in existence before the time of Edward I.

Mellish, Q.C. (*G. Evans* with him), for the appellant. As to the putchers and stop-nets at Hope Pill, which had existed for forty-five years, the commissioners were bound to presume, as matter of law, that they had existed from time immemorial. The evidence in the appellant's favour is not limited to the mere fact of user, but it is shewn that the manor of Arlingham was formerly a portion of the Great Barony of Berkeley, which was in existence in the time of Henry II., and in parts of which putchers and stop-nets have been proved before the commissioners to have been legally used from time immemorial. Further, the feoffment of 1610, by which the owner of the Great Manor of Berkeley conveyed the manor of Arlingham, expressly mentions "all the free fishing and several fishing in the river Severn." There being nothing contradictory of the inference to be drawn from these facts, they prove the legality and antiquity of the appellant's claim.

[BLACKBURN, J. In *Gann* v. *Whitstable Free Fishers* (1) it was decided by the House of Lords that the claim cannot be supported merely by evidence of long user. The claim must be shewn to be such as may have lawfully existed from time immemorial.]

No doubt; but here the facts shew that there was a fishery which might have a legal origin. From Hale, de jure maris, part 1, c. 6 (Hargrave Tracts, p. 35), it is evident that fisheries in the Severn connected with the manor of Berkeley existed from very ancient times. With regard to the putchers at Hock Crib, which have existed for twenty years, the same argument applies, although with less force.

[BLACKBURN, J. The evidence as to the enjoyment for twenty years would certainly not lead me to infer the legality of the claim.]

But in the second place, even if the stop-nets are not legalized by forty-five years user, the appellant was entitled to use them at the passing of the Salmon Fishery Act, 1861, and is protected by the proviso in s. 11. It is admitted that the stop-nets are

(1) 11 H. L. C. 192; 35 L. J. (C.P.) 29.

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fixed engines within the meaning of that statute; but the commissioners have found that the appellant is the owner of a several fishery legally created by a grant from the Crown before Magna Charta, and until the year 1861, the owner of a several fishery enjoyed, as incident thereto, the privilege of using any engine in fishing, or any mode of fishing he thought fit, except such engines and such modes of fishing as had been forbidden by some statute. No statute had prohibited the employment of these stop-nets, which, until 1861, were legal; and as the appellant was seised of a several fishery created by grant, and used the stop-nets in 1861, their use was exempted from the operation of the Salmon Fishery Act, 1861, which does not apply to a "mode of fishing lawfully exercised at the time of the passing of his act by any person by virtue of any grant, charter, or immemorial usage." It is sufficient to enable the appellant (who is the owner of a several fishery) to succeed, that no statute forbade the use of stop-nets. The commissioners relied on 2 Henry 6, c. 15 (1), but that statute does not apply; it forbids only those nets which are left fastened day and night, and does not interfere with nets fastened only whilst a person is actually present to catch the fish. The fish would escape from the stop-net unless a person were in the boat to take them out of it. Therefore, as the appellant had a several fishery, and actually used the stop-nets as an incident to the right of fishing, he is still entitled to use them.

(1) 2 Henry 6, c. 15:—"That the standing of nets and engines called trinks, and all other nets which be and are wont to be fastened and hanged continually day and night by a certain time in the year to great posts, boats, and anchors, overthwart the river of Thames, and other rivers of the realm, which standing is a cause of as great and more destruction of the brood and fry of fish, and disturbance of the common passage of vessels, as be the wears, kydels, and any other engines, be wholly defended" [*defenduz*] "for ever; (2) and that every person that setteth or fasteneth them hereafter to such posts, boats, and anchors, or like thing continually to stand as afore is said and be duly thereof by the course of the law convict, shall forfeit to the king cs. at every time that he is so proved in default; (3) Provided always, That it shall be lawful to the possessors of the said trinks if they be of assise to fish with them in all seasonable times, drawing and pulling them by hand as other fishers do with other nets, and not fastening or tacking the said nets to posts, boats, and anchors, continually to stand as afore is said; (4) Saving always to every of the king's liege people, their right, title, and inheritance in their fishings in the said water."

Sir J. B. Karslake, in reply. The Salmon Fishery Act, 1861, s. 11, and the Salmon Fishery Act, 1865, s. 39, only protect those fixed engines which were lawfully used at the time of the passing of the former act; the stop-nets were not lawfully used in 1861. The proviso in s. 11 applies only to a mode of fishing anciently existing; it was not intended by the Act of 1861 that the owner of a several fishery existing by grant or charter might successfully claim as privileged a mode of fishing first adopted within a few years before 1861; and at any rate a lawful mode of fishing with fixed engines, if not actually used in 1861 or one of the four preceding years, was thenceforth prohibited. Where a several fishery exists by charter, all modes of fishing not expressly mentioned therein are prohibited. It is clear that the right of the public to fish for salmon with fixed engines is abolished, and therefore it is not strange that the rights of individuals have been abridged. But further, the stop-nets were an obstruction to the navigation of the river and a nuisance. They were also forbidden by 2 Henry 6, c. 15; the effect of the whole of that statute is to prohibit the use of all nets that are stationary and not drawn by hand.

COCKBURN, C.J. I am of opinion that our judgment should be for the respondent. The commissioners have found that the 350 putchers, and the three stop-nets, had been in use for forty-five years before the passing of the 24 & 25 Vict. c. 109, and the 130 putchers for twenty years. The statute requires, in order to legalize the use of putchers, that they should have existed from time immemorial, and the commissioners have decided upon the evidence of user, that they were not warranted in coming to the conclusion that this right had been in existence from that time. I concur in thinking that they could not have found otherwise with reference to the putchers as to which an enjoyment of twenty years only had been proved. But with regard to those putchers as to which there had been an enjoyment for forty-five years, the question is one of fact. The commissioners had the evidence before them, and it was competent to them to find either one way or the other. Our attention was called to the other circumstances in the case, and I think they are not at all unworthy of attention, and might have carried more weight with the commissioners, seeing that this was undoubtedly a

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several fishery, and that it was a several fishery appurtenant to a manor which had formed part of the great manor of Berkeley, and in other places which had belonged to that great lordship similar rights to these existed, and were found to have existed, from time immemorial. If a jury, taking these circumstances into consideration, had found that this mode of fishing had existed from time immemorial, and application had been made to us for a new trial, I should not have been disposed to disturb the verdict. On the other hand, if the jury had arrived at the opposite conclusion, and if we had been applied to, we should have said it was perfectly competent to them to find one way or the other. What I understand the commissioners to refer to us is not the propriety of their finding or of their conclusion as to the facts, but whether, on proof of a user of forty-five years, they were bound by a conclusive presumption of law to say, that because there was no evidence to negative an origin before the time of legal memory, the right must have existed before that period. I cannot say that I think they were so bound, but it was perfectly free to them to arrive at the conclusion which they have adopted. I think, as matter of law, we cannot say that the commissioners are wrong, or that their decision should be set aside. For the same reason the stop-nets cannot be assumed to have existed from time immemorial, and with regard to them it seems to me that these nets are, from the manner in which they are used, within the mischief aimed at by the 2 Henry 6, c. 15, and therefore that they could not be lawfully used so as to fall within the proviso of the 24 & 25 Vict. c. 109, s. 11. The first part of the statute of 2 Henry 6, c. 15, speaks only of nets fastened and hanged continuously day and night, and afterwards, in the second part, it prohibits nets fastened, &c., "continuously to stand as afore is said," so that in the second part it would appear that to be within the statute the nets must be fastened by day and night. But I think the proviso shews the meaning of the legislature. It was meant that no nets should be permanently attached to posts, boats, and anchors, and that only those nets might be used which could be drawn and pulled by hand, and which did not interfere with the navigation of a river, and did not destroy the fry of fish. It is admitted by the appellant that for not less than three hours at a time this obstruction is continuous and effectually bars

the navigation, and also obstructs the passage of the fish; while, according to the respondent's view, the stop-nets are used some six or seven hours from half flood to the half ebb. (1) Although the obstruction to the navigation is not continuous in the sense of its lasting by day and by night, yet it is of a serious character, and for all practical purposes is almost or even quite as mischievous as though it existed without any interval of cessation. I think the stop-nets within the mischief of the statute, and unless they existed before the time of 2 Henry 6, c. 15 was passed, they do not come within the protecting provision of the Salmon Fishery Act. I think, therefore, that these stop-nets are illegal, and that the commissioners were right in the view they have taken.

BLACKBURN, J. I am of the same opinion. The first question is as to the claim to use the putchers, which the commissioners held could not be legal unless they have been used from and before the time of Magna Charta. And I think the commissioners were right. On the second question, the commissioners decided that the stop-nets were not used before the time of Henry VI., and therefore were illegal. Both questions turned upon the point whether or not the putchers and stop-nets had been used at a time far more remote than that as to which evidence was produced. I agree that a great deal of evidence was brought forward with a view to establish the claim to use the putchers and the stop-nets; it is proved that the manor of Arlingham was part of the great manor of Berkeley, and that in 1610 a conveyance had been made of the manor of Arlingham expressly mentioning "all that free fishing and several fishing in the river Severn." And it was proved that other putchers and stop-nets had been legally used from time immemorial at certain places within the manor of Berkeley. No doubt this is evidence to show that in those other places there were several fisheries, and it is now not improper that putchers and stop-nets should be used in them. These matters have some bearing as to the legality of the claim to use the putchers and stop-nets in question, but the

(1) It was admitted during the argument that the stop-nets were not fixed during the whole twenty-four hours, and that they could only be used about the time of high water. According to the respondent, they were fixed for six or seven hours at every tide; according to the appellant, for two or three hours.

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evidence which they afford is slight, and if there had been no evidence of any user of these putchers and stop-nets in question before the year 1861, I should certainly think that the commissioners would have been bound to find them illegal: but there is evidence beyond that time, and in the one instance the evidence shews that the putchers had been used twenty years before 1861, and in the other instance that the putchers and the stop-nets had been used for forty-five years. In the former instance, the evidence is very weak; if it had gone back as far as living memory, it might have been sufficient; but so short a period as twenty years, unless there was some good reason why the appellant could not adduce evidence as to any preceding time, would not be enough. The instance of user for forty-five years was much stronger. The commissioners might have found that the putchers had been used during a longer time, but they were not bound to do so; and many circumstances might induce them not to come to such a conclusion. They have found as a fact that the putchers have been used for a period of forty-five years, but they have not found they were used from time immemorial; that makes a great difference in my view of the legality of the claim. The commissioners might very well have drawn the inference in favour of the appellant, though as my Lord has said, in no sense were they bound to do so. But the commissioners have not found an immemorial usage, and it is unnecessary to consider what our decision would be if they had.

I now pass to the question whether stop-nets are forbidden by the 2 Henry 6, c. 15. It is not disputed that the stop-nets were stationary, and it is necessary to decide whether they were lawfully used in 1861. It is a difficult point, and depends upon the meaning of 2 Henry 6, c. 15. The first part appears to be aimed at nets which were fastened and hanged continually day and night by a certain time in the year; and the second part forbids that they be set or fastened "continually to stand as aforesaid." I do not think that these nets can be said to be permanently fixed, but I do not think that the statute forbids merely nets fixed during the whole of the twenty-four hours of the day. Although not stated in the case I understand that the boats and nets in 1861 were not continually fixed at one spot, but were placed there from half flood to half ebb, but for all practical purposes the passage of the fish and

the navigation of the river are obstructed during the time the tide is up, and the question whether these nets were continually fixed seems to depend on whether they were set during all that portion of the day at which alone it was practicable for the fish to pass, and the navigation to be carried on. If this be so, it is a question of fact for the commissioners, and in my opinion they were right in saying that the stop-nets came within the mischief at which the 2 Henry 6, c. 15 was aimed at, and consequently could not be legal. If the nets had been used before that statute, the result would have been exactly the same as if they had been used before the time of Magna Charta. I think the commissioners might have found that they did lawfully exist before that statute, but I certainly cannot say that they were bound to do so.

MELLOR, J. I also am of opinion that our judgment must be for the respondent. It appears to me that on the view which the commissioners took of the evidence they were perfectly warranted in not finding that there was an immemorial mode of fishing. The object of appointing the commissioners is that they shall investigate, and therefore, unless they find that there is a title by grant, charter, or immemorial usage, it is their duty to declare every mode of fishing with a fixed engine illegal. But when a right of fishing is claimed by virtue of a grant, charter, or immemorial usage, it is a matter of discretion for the commissioners whether they ought to be satisfied that it has been legally enjoyed. In cases of this description there may be a great body of evidence of user; but if it be confined only to a period of forty-five or twenty years, the commissioners have a right to ask themselves whether or not they have had brought before them such evidence as is necessary to support a claim of immemorial usage, and they are not bound by evidence of user for forty-five or twenty years. If from the nature of the case the commissioners might reasonably expect that other evidence might have been forthcoming, and which they believed had been kept back, I think the commissioners were right in deciding against the claim.

I concur with my Lord as to the construction of the 2 Henry 6, c. 15. I think the expression "continually" means not permanently but continuously. My opinion is strengthened by the words

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in the proviso, "drawing and pulling them by hand as other fishers do with other nets." I think this shews that all nets not worked by hand are prohibited, and it is manifest that these nets are fixed for a considerable period of time.

LUSH, J. I am of the same opinion. The commissioners were not bound to find that these putchers and stop-nets were used from time immemorial; and as to those putchers which had existed for only twenty years, they would not have been justified in finding an immemorial usage in favour of them. This is not enough to determine the question as to the stop-nets, if they were not forbidden by the statute of 2 Henry 6, c. 15. At first I was inclined to think that the act forbade only those nets which were fastened, and hanged continuously day and night by a certain time in the year, but on further consideration I feel satisfied that that statute was intended to forbid the use of any net not drawn by hand.

Judgment for the respondent.

Attorneys for appellant: *Wood, Street, & Hayter.*
Attorney for respondent: *The Solicitor to the Treasury.*

June 23.

POWELL *v.* HOWELLS AND OTHERS.[a]

Will—Devise, Construction of—Implication of Cross-remainders.

A testatrix devised one moiety of certain freehold property unto and between William, Thomas, and David P., in equal shares, and the heirs of their bodies respectively lawfully begotten, and in default of such issue of any of them, unto M. P., her heirs and assigns, for ever:—

Held, that cross-remainders were created by implication between William, Thomas, and David P., and that the words "of any of them" must be construed in the sense "of all of them."

EJECTMENT to recover, amongst other hereditaments, a moiety of a certain dwelling-house and lands, situate at Treose, in the parish of Llangan, in the county of Glamorgan.

At the trial before Pigott, B., at the Glamorganshire spring assizes, it appeared that Anne Davies duly executed a second codicil, dated July, 1832, to her will, as follows: "I have purchased a tenement

and lands at Treose, in the parish of Llangan, since the making of my will and codicil; now I give and devise the same as follows, that is to say—One moiety thereof unto and between my three nephews, William, Thomas, and David Powell, in equal shares, and the heirs of their bodies respectively lawfully begotten, and in default of such issue of any of them, unto Mary Powell, widow, her heirs and assigns, for ever; and the remaining moiety unto Jane, wife of Evan Gibbon, for the term of her life, and after her decease, unto and between her two sons, Edward, and Evan Gibbon, equally, and the heirs of their bodies lawfully begotten, and in default of such issue of both of them, unto the said Mary Powell and her heirs for ever."

The testatrix died in September, 1832; William Powell died unmarried in 1840, having previously executed a disentailing deed and conveyed his third to David. David died in 1846, leaving the plaintiff his only son, and having also executed a disentailing deed. Thomas died in 1857, unmarried, not having executed any disentailing deed. David Powell left a will by which he devised the other hereditaments and the shares of William and David to the defendant Howells; this will was disputed by the plaintiff on the ground of insanity.

On this issue the jury found for the defendants, and a verdict was entered for the defendants as to the whole of the property, with leave to the plaintiff to move to enter a verdict for him as to Thomas Powell's third of the moiety devised by the second codicil to Anne Davies' will, if the Court should be of opinion that cross-remainders were created by the limitations.

A rule was obtained accordingly.

Grove, Q.C., Joshua Williams, Q.C., J. W. Bowen, and *G. B. Hughes* shewed cause. The question is, whether Thomas Powell's share went to Mary Powell, or whether the plaintiff is entitled to it under an implied cross-remainder. The language used in devising the moieties is different. If "all" was substituted for "any," it must be admitted that cross-remainders would be implied: Anon. Dyer, 303 b; *Holmes* v. *Meynel.* (1) It is evident that the testatrix did not intend the devolution of the two moieties

(1) Sir T. Raym. 452; 2 Show. 136.

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to be similar, the language used with respect to the first being different from that used with respect to the second: 1 Jarman on Wills, 463, 3rd ed.; *Right* v. *Compton*. (1) The codicil contains no express words giving cross-remainders; the plaintiff must shew some reason why they should be implied. In some instances cross-remainders are implied because the gift goes to a class: *Green* v. *Stephens* (2), but here there is no gift to a class. No doubt they are implied between more than two tenants in common where it appears to be the wish of the testator that, upon the failure of their issue, the whole of the estate shall go over entire; but the word "respectively" cannot be struck out of the devise, and it shews that the testatrix did not intend that the whole moiety should vest in Mary Powell at one time. Whether cross-remainders can be implied or not, is a question of construction: *Taaffe* v. *Conmee* (3); and if the intention of the testator is doubtful, the words must be construed in their ordinary meaning: *Atkinson* v. *Holtby*. (4) Another reason why cross-remainders are implied is, that the whole estate should be kept entire, but here the testatrix has split up her estate into moieties, in each of which a different class of persons is interested.

H. S. Giffard, Q.C., and *Michael*, in support of the rule. The whole question is, whether "any" means "all." The devise divides the property into two parts, and the intention is to give one half to the brothers Powell and the other half to the Gibbons, and in default of their issue to give the property to Mary Powell. The different language used is accurate with respect to each part. The word "both" could not be used in the devise of the first moiety. "In default of such issue of any of them" means, in popular language, if there be issue of none of them. It is clear that if the words were "in default of issue," cross-remainders would be implied. A reasonable construction must be put on the words, so that the manifest intention of the testatrix can be carried out.

BLACKBURN, J. I think, taking the words of the will and applying to them the proper rule of construction, that their effect is that the plaintiff is entitled to recover one-third of a moiety of the

(1) 9 East, 266.
(2) 12 Ves. 419, S.C. 17 Ves. 64.
(3) 10 H. L. C. 64, per Lord Cranworth, at p. 85.
(4) 10 H. L. C. 313.

property. I think the testatrix left the property to the three Powells in equal shares, with cross-remainders between them, and it was her intention that the remainder to Mary Powell should not take effect until the preceding cross-remainders had been exhausted. If the codicil had stopped after the word "issue," and the words "of any of them" were omitted, then it is clear the devise over to Mary Powell would not have taken effect until default of all issue of each of the three nephews, and cross-remainders would have been implied. If the words "default of issue of any of them" were construed as not implying cross-remainders, each third of the moiety would devolve at different times, and there would not be a devise of an unbroken moiety to Mary Powell; we are therefore obliged to say that cross-remainders do exist, in conformity with the reasoning of Mansfield, C.J., in *Doe* v. *Webb* (1), so that the moiety may vest entire in Mary Powell, and not vest in her at different times. The words "any of them" are ambiguous: they may mean either "if no one of the three nephews has issue," or, "if any one of them has not issue." As far as I can gather the intention of the testatrix, I do not think the words were used in the latter sense.

It is clear that in the second devise there are cross-remainders, but I do not rely on the words of that devise.

LUSH, J. I am of the same opinion. The question is, what did the testatrix intend? Did she intend Mary Powell to take the moiety entire or in parts? Looking at the codicil as a whole, Mary Powell is not to take less than the entire moiety. This is clear, because she is to take the interest of which the testatrix has been speaking, viz., the whole moiety devised to the three nephews. I think the rule must be made absolute to enter a verdict for the plaintiff for one-third of the moiety devised in the codicil.

Rule absolute accordingly.

Attorney for plaintiff: *J. H. Wrentmore.*
Attorney for defendant: *Sawbridge.*

(1) 1 Taunt. 234.

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June 5.

MORTON AND OTHERS *v.* WOODS AND OTHERS.

Landlord and Tenant—Effect of Mortgage not executed by Mortgagee with Attornment by Mortgagor as Tenant—Estoppel—Construction of Mortgage Deed.

B., being mortgagor in possession, executed a mortgage on the 12th of September, 1866, of the premises to the defendants to secure the repayment with interest of certain advances by the defendants. The mortgage was by indenture between B. and the defendants, but was never executed by the defendants; the deed recited the previous mortgage (which was in fee), and by it B. conveyed all the premises comprised in the recited mortgage to the defendants, in fee, upon trust that the defendants should, either immediately or at any time, sell them, and as a further security for the principal and interest for the time being due from B. to the defendants, B. did thereby attorn and become tenant to the defendants, their heirs and assigns, as and from the date thereof, of such of the premises thereby conveyed as were in his occupation for and during the term of ten years, if that security should so long continue, at the yearly rent of 800*l.*, to be paid on the 1st of October, the first yearly rent to be payable on the 1st of October then next. Provided that, notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators, or assigns, before or after the execution of the trusts of sale, to enter upon the said mortgaged premises, or any part thereof, and to eject B., or any person claiming through him, and to determine the said term of ten years, notwithstanding any lease that might have been granted by B." B. continued accordingly in occupation of the premises; and on the 15th of October, 1866, the defendants distrained for the first year's rent:—

Held, that the intention of the parties, as evidenced by the deed, was to create a tenancy at will only, and not a term of ten years; that a deed being therefore unnecessary, the tenancy was created by the assent of the parties and the occupation under it, and that the fact that the defendants had not executed the deed was immaterial. Secondly, that, the parties having agreed that the relation of landlord and tenant should be established between them, the mortgagor was estopped from setting up that the defendants had no legal reversion; and that it made no difference that the fact of the mortgagor having only the equity of redemption appeared on the face of the deed; and that the distress was therefore valid.

Case stated without pleadings.

1. This is an action brought by the plaintiffs against the defendants for the recovery of 939*l.* 11*s.* 2*d.* damages for the seizure under a distress warrant of certain chattels alleged by the plaintiffs to be their property as creditors' assignees of the estate and effects of John Brown, junior, a bankrupt.

2. By his last will, dated the 10th of March, 1864, John Brown, senior, who died on the 30th of March, 1864, devised all his real and personal estate unto his sons, Lancelot Brown, and John Brown,

junior, and one William Henry Jolly, their heirs, executors, administrators, and assigns, upon certain trusts in the will mentioned.

3. Lancelot Brown died on the 7th of September, 1866, leaving his two co-trustees still surviving.

4. The said devise includes certain hereditaments situate at South Hylton, hereafter called the "Rivet Manufactory," which is the only portion of the testator's real estate to which this case refers, and which rivet manufactory was, on the 12th of September, 1866, and thence until the date of his bankruptcy, in the occupation of Brown.

5. Brown was, prior to and at the date of the mortgage to Frederick Horn, dated the 30th of May, 1865, hereafter mentioned, seised in fee of certain other hereditaments also situate at South Hylton, called the "Rolling Mills," which were, on the 12th of September, 1866, and thence until his bankruptcy, in the occupation of Brown.

6. By indenture, dated the 30th of May, 1865, and made between Brown of the first part, the said Lancelot Brown of the second part, and the said Frederick Horn of the third part, in consideration of 1500*l.* to Brown by Frederick Horn then paid, Brown released and conveyed to Horn in fee a certain piece or parcel of ground in the indenture particularly described, including the rolling mills, to the use of Horn in fee, subject to a proviso for redemption, and with a power of sale. Lancelot Brown joined in this deed only as surety for his brother.

7. At the time of the execution by Brown of the indenture of the 12th day of September, 1866, hereafter mentioned, and for some time previously, he banked with the defendants, who are bankers carrying on business in co-partnership at Newcastle and Sunderland under the style or firm of "Woods & Co."

8. On the 8th of September, 1866, Brown, who was then indebted to the defendants, on the balance of his banking account, in a sum of about 1300*l.*, applied to the defendants to make him further advances to the extent of 1800*l.* to enable him to carry on his business, which they agreed to do on the terms specified in the following memorandum which he then signed and delivered to them:—"1866. September 8. Memorandum.—In consideration of Messrs. Woods & Co. this day agreeing to advance me to the extent

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of 1800*l.*, I agree to execute to them a mortgage on my freehold land, rolling mills, machinery, fixtures, plant, and premises at South Hylton (subject to a present mortgage of 2500*l.* to F. Horn, Esq.), and also on all my estate, share, and interest in the rivet manufactory near to the above premises, and on the entirety of the machinery therein, such to be for securing the above advance and all moneys due or to become due from me to the said Messrs. Woods & Co. on my account with them, or on any bills of exchange, or on any other account whatsoever. Such mortgage to contain absolute powers of sale, and an attornment as tenant, at the rent of 800*l.* per annum, payable in advance, and all other usual clauses. Interest at the usual rate charged by the said Messrs. Woods & Co. This security to be a continuing security notwithstanding any change in the firm by death, change of partners, or otherwise."

9. After the memorandum was so signed and delivered, and before the execution of the indenture of the 12th day of September, 1866, the defendants in pursuance and on the faith of the terms of the memorandum made further advances to Brown to the amount of 1649*l.* 10*s.*, or thereabouts, in part of the said sum of 1800*l.* so agreed to be advanced by them.

10. By indenture dated the 12th of September, 1866, and made between John Brown, junior, of the first part, and the defendants of the second part, after reciting the before-mentioned indenture of mortgage, dated the 30th of May, 1865, and an indenture of further charge to the said Frederick Horn of 1000*l.* upon the premises included in the last-mentioned mortgage, dated the 6th of July, 1866, and also reciting that the two several sums of 1500*l.* and 1000*l.* were still due on the recited securities, but all interest thereon respectively had been paid to the then last current day of payment, and also reciting that under the before-mentioned last will of John Brown, senior, the said John Brown, junior (subject as in the will was expressed), was entitled in fee to one undivided moiety of all the real estate devised by the said will, and including in such real estate the said rivet manufactory; and also reciting that part of the real estate of the testator devised by the said will (and which part included the said rivet manufactory) had by agreement and arrangement with the trustees and other parties beneficially interested in the will been for some time and then was

in the exclusive possession of John Brown, junior, who then carried on the trade of a rivet manufacturer thereon, and that all the machinery and plant of every description on the said rivet manufactory, were the exclusive property of the said John Brown, junior, and also reciting that Brown being then indebted to the defendants on balance of his banking account with them had, in order to induce them to forbear then from taking proceedings at law against him to recover such balance and to continue their dealings with him, contracted to give them such mortgage or security as thereinafter appearing, in consideration of the premises, and also in consideration of 10*s.* paid by the defendants to Brown. Brown did thereby appoint, grant, release, convey, and confirm to the defendants (amongst other things) first, all that piece of ground and hereditaments including the said rolling mills, being the hereditaments comprised in and conveyed to the said Frederick Horn by the said indenture of mortgage of the 30th day of May, 1865; and secondly, all that undivided moiety, and all other the share, beneficial estate, and interest of Brown, of and in the said rivet manufactory, and all other the real estate devised by the will of the said testator, and also the entirety of the machinery both fixed and moveable, and all engines, boilers, cranes, and other fixtures, articles, and plant in and upon the said rivet manufactory, then or thereafter to be in the occupation of Brown. To have and to hold the said land, hereditaments, puddling furnaces, rolling mills, machinery, manufactories, and all other the premises thereinbefore described, and thereby intended to be granted, assured, or otherwise conveyed with their appurtenances unto the defendants, their heirs, executors, administrators, and assigns, according to the different natures or tenures thereof respectively, upon trust, that they the defendants should either immediately or at any time or times thereafter sell and absolutely dispose of the said several hereditaments, and all other the premises thereinbefore described and granted, assured, or otherwise conveyed, and should apply the purchase-money to arise from such sale in manner therein mentioned; and as a further security for the principal and interest moneys, for the time being due from Brown under or by virtue of the present indenture, Brown did thereby attorn and become tenant to the defendants, their heirs, and assigns, as and from the date thereof, of such of

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the said hereditaments and premises thereby granted or otherwise conveyed as was or were in his occupation for and during the term of ten years, if that security should so long continue at and under the yearly rent of 800*l.* to be paid yearly on every first day of October in every year, the first yearly rent to be paid and payable on the first day of October then next. Provided that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators, or assigns, before or after the execution of the trusts of sale therein contained, to enter into and upon the said mortgaged premises, or any part thereof, and to eject the said John Brown, junior, and any tenant or person claiming or to claim under him therefrom, and to determine the said term of ten years, notwithstanding any lease or leases that might have been granted by Brown.

11. The indenture of the 12th of September, 1866 (the recitals of which are to be taken as true so far as the facts stated therein are not in this case shewn to have been varied), was executed by Brown on the day of the date thereof, but it was at the date of making the distress hereafter mentioned, and still is unexecuted by or on behalf of the said Woods & Co. The said indenture of the 12th of September, 1866, was executed by Brown, in pursuance of the said memorandum of the 8th of September, 1866, and on the execution thereof the defendants made him further advances, amounting with the advances so made by them between the giving of the memorandum and the execution of the indenture to a sum exceeding the said sum of 1800*l.* mentioned in the memorandum.

12. After his execution of the said indenture of the 12th of September, 1866, until and at the time of the making of the distress hereafter mentioned, Brown continued his exclusive occupation both of the rivet manufactory and of the rolling mills. In the beginning of October, 1866, Brown found himself in such pecuniary difficulties as to be unable to carry on his business any longer, and suspended payment.

13. On the 15th of October, 1866, the defendants, by their bailiff, distrained certain goods and chattels which at the time of such distress were on the rivet works, and the rolling mills respectively, for 800*l.*, being one year's rent, which, under the in-

denture of the 12th of September, 1866, accrued due on the 1st of October, 1866. At the time when this distress was made, there was due to the defendants from Brown, on the security of the said indenture, a sum considerably exceeding the sum for which the distress was made.

14 and 15. On the 25th of October, 1866, Brown filed a declaration of insolvency, and on the 23rd of November, 1866, he was adjudicated a bankrupt on a creditor's petition, and the plaintiffs have been appointed creditors' assignees under such bankruptcy.

16. The plaintiffs paid to the defendants the sum of 939*l.* 11*s.* 2*d.* for rent and costs of distress, under protest.

17. On payment of the said sum, the defendants withdrew from possession of the distrained chattels, and the plaintiffs have since sold the same.

The question for the opinion of the Court was whether the distress made by the defendants was legal and valid.

Manisty, Q.C. (with him *H. Shield*), for the plaintiffs. As the defendants did not execute the deed of the 12th of September, 1866, the term of ten years intended to be created did not pass, and consequently, the rent which was to issue out of that estate cannot be distrained for: *Swatman* v. *Ambler*. (1)

[BLACKBURN, J. May not this deed operate as a conveyance by the mortgagor to the defendants in fee, to the use of the mortgagor for ten years, and the use be executed?

LUSH, J. Suppose nothing had been said about a term of ten years, and the mortgagor had attorned simply as tenant at will to the mortgagees, no deed would have been necessary. Does the clause of attornment, looking at the position of the parties, really mean more than that the mortgagor agrees to become tenant at will to the mortgagees, paying rent for ten years if allowed to remain in possession so long, and the mortgage debt is not previously discharged?

COCKBURN, C.J. On that construction of the deed, *West* v. *Fritche* (2) is a decisive authority that the relation of landlord and tenant was created although the defendants did not execute the deed.]

(1) 8 Ex. 72; 22 L. J. (Ex.) 81. (2) 3 Ex. 216; 18 L. J. (Ex.) 50.

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In that case the mortgagor had not only remained in possession but had paid rent.

[COCKBURN, C.J. The Court base their decision simply on the ground of subsequent occupation. Parke, B., says: "We all think that the subsequent occupation, connected with the covenant, constituted the relation of landlord and tenant, so that the mortgagees could distrain."]

The deed not having been executed, it only amounts to evidence of an agreement for a lease, and then, unless there has been some payment of rent, the defendants had no right to distrain: *Dunk* v. *Hunter*. (1) But the intention evidenced by the deed was to create a term of ten years, terminable under certain circumstances at the will of the landlord.

[LUSH, J. Does that amount to more than a tenancy at will?]

The clause expressly says the mortgagees are to be at liberty to enter and determine the said term of ten years. Secondly, as to part of the premises, the deed discloses on the face of it that the mortgagor had only the equity of redemption, and had no legal estate to convey, so that the defendants have no legal reversion to sustain the distress. There can be no estoppel of the tenant where the true title of the lessor is disclosed on the face of the demise. In *Pargeter* v. *Harris* (2) the recitals in a lease shewed that the lessors had only the equity of redemption; and Lord Denman, C.J., delivering the judgment of the Court, says:—"That recital is of itself sufficient to prevent either party being estopped from denying that the plaintiffs had a legal reversion: in truth it estops them from asserting it." This doctrine is expressly upheld in the judgment of the Court of Exchequer in *Cuthbertson* v. *Irving* (3), and the judgment of the Court below is adopted by the Exchequer Chamber. (4)

[COCKBURN, C.J. In *Jolly* v. *Arbuthnot* (5) the Lord Chancellor held that a mortgagor, having attorned tenant to a person who was merely a receiver, was estopped from denying the tenancy, although the facts appeared on the face of the deed.]

(1) 5 B. & A. 322.

(2) 15 L. J. (Q.B.) 113, 117; 7 Q. B. 708, 728.

(3) 4 H. & N. at p. 754; 28 L. J. (Ex.) at p. 308. 5 Jur (N.S.) 740

(4) 6 H. & N. 135; 29 L. J. (Ex.) 485. 6 Jur (N.S.) 821

(5) 4 De G. & J. 224; 28 L. J. (Ch.) 547. 5 Jur (N.S.) 689

There the legal estate was in effect granted: the receiver had been appointed by the mortgagee and mortgagor, and the attornment by the mortgagor to the receiver was with the express assent of the mortgagee.

Mellish, Q.C. (with him *Kemplay*) for the defendants. The first question turns entirely upon whether it was the intention of the parties to create a term of ten years or only a tenancy at will; if the latter, the authorities are conclusive in the defendants' favour. The agreement for the advance shews that the intention was that the mortgagor should become tenant at a fixed rent of 800*l.*, payable in advance, for the obvious purpose of securing a right of distress in addition to other remedies for the repayment of the advance and interest, and the absolute power of sale in the proviso is inconsistent with anything but a tenancy at will, notwithstanding the term of ten years is mentioned; moreover, the whole scope of the instrument must be looked at, and not the mere clause of attornment alone: *Doe* v. *Olley*. (1) There the words of the instrument would have created a tenancy (which would have required a notice to quit), but for the obvious intention shewn by the proviso that, although the mortgagor should in other respects be in the position of a tenant, the mortgagee should have power to eject him at any moment. Suppose there had been no clause of attornment, it would have been obvious from the previous agreement that it was the intention that the mortgagor should be tenant at will.

[LUSH, J. It must, after all, be a question of intention on the construction of the deed; if there had been in the clause of attornment only the mention of the term of ten years, that could not have been controlled by the previous agreement.]

It is quite clear from the proviso that it was intended that the mortgagees should determine the tenancy at any moment, in other words, "at their will," and that is a tenancy at will, notwithstanding the mention of a term; thus, in Com. Dig. tit. Estates, by Grant (H. 1), tenancy at will "may be by express words, as if A. lets land to another, quandiu ambabus partibus placuerit. Or quandiu the lessor pleases: for by implication of law it shall be at the will of both: for it cannot be at the will of the lessor only:" citing Co. Lit. 55a. It may also be put, as suggested

(1) 12 A. & E. 481.

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from the bench, that the deed operated as a conveyance from A. to B. in fee, to the use of A. himself for ten years, he paying rent, remainder to B. in fee. On the second point, *Jolly* v. *Arbuthnot* (1) is a conclusive authority in favour of the defendants, that the estoppel exists, notwithstanding the want of a reversion is shewn on the face of the deed; and that decision proceeds on the much older case of *Dancer* v. *Hastings* (2), as reported in Moore more fully than in Bingham, which had been distinguished by the Master of the Rolls on the ground that the fact that the landlord was a receiver only did not appear in the lease.

[COCKBURN, C.J. Mr. Manisty distinguishes the case of *Jolly* v. *Arbuthnot* (1) on the ground that the attornment was with the assent of the mortgagee.]

That can make no difference: *Evans* v. *Mathias* (3) shews that an attornment to a receiver cannot operate in favour of the real owner.

Shield, in reply. The deed could not operate in the manner suggested as a conveyance under the Statute of Uses. A term of ten years was intended to be granted, subject to be determined if the landlord chose.

[COCKBURN, C.J. A tenancy at the will of the lessor is at the will of both parties, according to the authorities cited.]

On the second point, *Greenaway* v. *Hart* (4) is an authority directly at variance with those cited for the defendants.

COCKBURN, C.J. I think the case, when cleared from the cloud of dust raised from the depths of legal erudition, assumes a clear and satisfactory character; and that we shall be able to carry out the intention of the parties, and do what is but justice, without contravening any rule of law. The objections taken to the validity of the distress may be divided into two. The first objection is founded on the non-execution by the defendants of the deed, they being mortgagees, who have distrained for rent; and on this it is said, first, that the relation of lessor and lessee did not come into operation at all; and, secondly, that it was the intention of the parties to create a lease of ten years, and inasmuch as the deed was not

(1) 4 De G. & J. 224; 28 L. J. (Ch.) 547. 5 Jur. N.S. 1609

(2) 12 B. Moo. 34; 4 Bing. 2.

(3) 7 E. & B. 590; 26 L. J. (Q.B.) 309. 3 Jur. N.S. 793.

(4) 14 C. B. 340; 23 L. J. (C.P.) 115. 17 Jur. 449.

executed by the mortgagees the intention failed, and, as the term was not created, the rent reserved upon it cannot be distrained for. The case of *West* v. *Fritche* (1) shews that where there is a deed of this description, although it be not executed by the mortgagee, yet the mortgagor having attorned and occupied after the deed was executed by him, the relation of landlord and tenant is created. With reference to the intention to create a term, and the failure by reason of the non-execution of the deed, any tenancy for a term not beyond three years may be created without any deed or writing, and, in my opinion, it is plain that all the tenancy the parties intended to create was a tenancy at will, no more and no less. The primary object of the parties was to secure to the mortgagees the amplest remedies to enforce the repayment of the mortgage money and interest, and though the term of ten years is mentioned, it was intended, on the one hand, that the lessors should be fully empowered to turn the mortgagor out at any moment, and so to realise their security by sale, while, on the other hand, the mortgagor should be empowered to get rid of his tenancy by paying off the mortgage money. That, I conceive, amounts to all intents and purposes to no more or less than an intention to create a tenancy at will, which might be created without any deed. Then comes the second objection, that a portion of the premises included in the deed, and on which the distress was levied, was land and other property already mortgaged, and in which, therefore, the legal estate was outstanding in other persons, and the mortgagor had only the equity of redemption in it; and it was contended that he had therefore no legal reversion to grant, and, consequently, that the defendants had none so as to be able to distrain. That argument, I think, well founded as far as it goes, that no legal reversion was in the defendants, but the answer is, that although it may appear on the face of the deed, that the defendants, the lessors, have not the legal estate, yet the tenant, and those who claim through him, are estopped, after he has attorned, from denying that the relation of landlord and tenant existed between the defendants and the mortgagor, so as to pass, as between them, the reversion into the lessor. There are cases, no doubt, in which the lessee is not estopped from denying his landlord's title,

(1) 3 Ex. 216; 18 L. J. (Ex.) 50.

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as in the case of eviction. But it is well settled that if a party takes land and enters as lessee of another, and the right of the lessor is in no way altered, the lessee is estopped from denying that relation and that the legal estate and reversion is in the lessor. Here, although the tenant did not come into possession under the mortgagees, he was permitted to retain possession on the footing of becoming their tenant, and he is equally estopped from denying their title. There are two authorities directly in point as to the estoppel. In *Dancer* v. *Hastings* (1), the case of a lease by a receiver of the court of chancery, of whom it would be impossible to say he had in fact the legal reversion, yet it was held, although his character of receiver appeared on the face of the lease, the tenant was estopped from denying that he was his landlord and had the reversion; and in the last case of *Jolly* v. *Arbuthnot* (2), before Lord Chelmsford, C., it had been agreed, for the same object as in the present case, that the mortgagor should remain in possession, and that a receiver should be appointed with all the powers of a lessor, and that the mortgagor should attorn tenant to him; all these facts were recited in the deed, and Lord Chelmsford held that the right to distrain could not be disputed, but arose either expressly, or out of the relation of landlord and tenant, created in pursuance of the intention of the parties as evidenced by the deed. So in the present case the manifest intention of the parties, as evidenced by this deed, was that the relation of landlord and tenant should be created between them, for the purpose of enabling the mortgagees the better to enforce their security, and with the intention therefore, though not expressed, that if the mortgagor or tenant should not be punctual in his payments, the mortgagees, as lessors, should have power of distress. Consequently the plaintiffs, being in the position of the tenant, are estopped from denying that the defendants were his landlords, or that they had the legal reversion. There must, therefore, be judgment for the defendants.

BLACKBURN, J. I am of the same opinion. Under this deed, which was executed only by the bankrupt, it was agreed that he should convey the estate to the defendants in fee, with a provision that the bankrupt should become and attorn tenant to them. (The

(1) 12 B. Moo. 34. (2) 4 De G. & J. 224; 28 L. J. (Ch.) 547.

learned judge read the provision.) The bankrupt accordingly continued in possession after he had executed the deed, and the first year's rent being unpaid the defendants distrained. The first question is, was there anything in the position of the parties under this instrument to enable the defendants to distrain? It cannot be doubted that the deed was intended to operate as an immediate lease, the object being to give the defendants an additional remedy by distress. The first objection is that the intention was to create a term of ten years, and that term could not be created except by deed, and that as the defendants did not execute the deed no such term was created, and therefore that there was no power to distrain. Supposing the intention to have been to create a term of ten years, I am not prepared to admit at once that that estate may not have been created. But when we look at the instrument to ascertain the intention of the parties, is it the true construction that they intended to create a term of ten years? I cannot think they intended that; the intention was that the mortgagor should become tenant at will to the mortgagees, with the understanding that he should be at liberty to remain for ten years should the will not be determined before. If this was the intention, then *West* v. *Fritche* (1) is a distinct authority that the fact of the one party remaining in occupation after he had executed the deed with the consent of the other is enough to create a tenancy. In that case no doubt the mortgagor had remained longer in possession, and had paid interest; but the interest was not paid as rent so as to make the payment material, and the Court base their judgment entirely on the ground of occupation. In the present case, therefore, I think there was sufficient tenancy created between the parties to entitle the defendants to distrain. Then comes the second objection, that a considerable portion of the premises was already mortgaged, and the mortgagor had only the equity of redemption, and it was contended, and rightly, that there must be a reversion in order to give a right of distress; but then there may be a reversion by estoppel; that is when one party is let into possession by the other under an agreement that the one shall be tenant and the other landlord, both parties are estopped as between themselves from denying the other's title. But in answer to that, it is said

(1) 3 Ex. 216; 18 L. J. (Ex.) 50.

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that in the present case it is disclosed on the face of the instrument evidencing the agreement of the parties, that the mortgagor had not the legal estate; but I do not see, on principle, why that should make any difference. The principle is, that if it is agreed that one shall be tenant to the other, both are estopped from disputing the other's title as landlord, and even though it be expressly stated that the landlord has no legal estate, still if they agree that the relation of landlord and tenant shall be created, and this agreement is carried out by the one being let into possession, as between them the relation of landlord and tenant is created, and they are just as much estopped as if there had been no such statement. There was no letting into possession here, but there was what amounted to the same thing, a continued occupation, instead of a change of possession and then a letting into possession again. This very principle has been acted upon in two cases: *Dancer* v. *Hastings* (1), and *Jolly* v. *Arbuthnot* (2), and I think they fully entitle us to decide in favour of the defendants.

MELLOR, J. I am of the same opinion. I cannot help thinking that on the true construction of this deed it was the object of the parties that John Brown should become the tenant at a fixed rent to the defendants, so as to give them a power of distress, and that it could not have been the intention to create a term of ten years, when he was to be liable to be evicted at any moment; but they intended to create a tenancy at will only, just as under ordinary circumstances the mortgagor becomes tenant at will to the mortgagee, but then if there be no ascertained rent the latter has no power to distrain. The second objection is that because there is no legal reversion as to part of the premises, the distress cannot be sustained. But when one looks at the doctrine of estoppel that objection is untenable. The real foundation of the estoppel is the fact of the one obtaining possession and enjoying the possession by the permission of the other. And so long as the one has this enjoyment, he is prevented by the rule of law from turning round and saying his landlord had no right or title to put him in possession. On the other hand, he is only estopped as long as the enjoyment continues, and if he be evicted by superior title, he is

(1) 12 B. Moo. 34. (2) 4 De G. & J. 224; 28 L. J. (Ch.) 547.

no longer estopped, as it would be unjust that he should continue liable to pay rent when the title of the other is put an end to. Subject to that exception, so long as he enjoys the benefit and remains in possession, he cannot deny that he is tenant of the person under whom he took possession and who has distrained upon him.

LUSH, J. I am glad to find that there is no legal impediment to our carrying out what appears to me to have been the evident intention of the parties. The first question is, what term did the parties intend the mortgagor should take from the mortgagees so long as the mortgage money remained unpaid? If a term of ten years, then the intended demise failed; if a term less than three years, then the mere assent of the parties amounted to a demise. It is plain that there was no intention that the mortgagor should remain in possession any given length of time, but that he should remain on the premises at the will of the mortgagees, he binding himself to pay 800*l.* for a term not exceeding ten years, if left in possession so long. That being the intention, the intended demise did not require a deed for its validity, and the objection that the mortgagees did not execute the deed falls to the ground. The other objection is that, as to a part of the premises, it appears that the mortgagor had no legal estate, but only an equity of redemption, so that the mortgagees have no legal reversion to sustain the distress; and the fact of this appearing on the face of the deed is relied on as preventing the doctrine of estoppel from applying. But this argument proceeds, as I apprehend, on a misapprehension of the foundation on which the doctrine rests; which is, that inasmuch as the parties have agreed that they should stand in the relation of landlord and tenant, and the one accordingly receives possession from the other and enters on the premises, so long as he continues in possession he cannot be heard to deny the state of facts which he has agreed shall be taken as the basis of the arrangement; in other words, he cannot set up that the landlord has no legal title. In the present case the mortgagor did not go out and receive possession from the mortgagees, but that formal ceremony was not necessary, because he attorned to the defendants, and he must therefore be in the same position as if

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he had gone out and come in again. The distress, therefore, is maintained in its entirety, and there must be judgment for the defendants.

Judgment for the defendants.

Attorney for plaintiffs: *J. W. Hickin, for Ralph Simey, Sunderland.*

Attorneys for defendants: *Young, Maples, & Co., for H. B. Wright, Sunderland.*

June 10.

IN THE MATTER OF A PLAINT OF BROWN *v.* COCKING AND OTHERS.

County Court, Jurisdiction of, in Ejectment—"Rent payable" in County Court Act, 1867 (30 *&* 31 *Vict. c.* 142), *s.* 11—*Prohibition.*

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By the County Court Act, 1867, s. 11, "all actions of ejectment, where neither the value of the tenements nor the rent payable in respect thereof shall exceed 20*l.* by the year, may be brought in the county court of the district in which the tenements are situate." A lessor having brought ejectment for a forfeiture:—

Held, that "the rent payable," meant the rent payable as between the litigant parties, and not any rent that might be paid by a sub-lessee; and that the latter rent, if above 20*l.*, though it would be strong evidence of value, was not conclusive against the jurisdiction of the county court.

Held, also, the county court judge having decided on conflicting evidence that the value of the premises did not exceed 20*l.*, that the Court could not review his decision by prohibition, though on a point going to his jurisdiction only.

RULE, calling on the plaintiff to shew cause why a writ of prohibition should not issue to the judge of the county court of Cornwall, holden at Redruth, to prohibit all further proceedings in the plaint.

It appeared from the affidavits that the plaint was brought to recover possession of certain tenements, under 30 & 31 Vict. c.142, s. 11 (1), by the plaintiff as landlord, on the ground of a forfeiture for non-repair after notice. The tenements were let in 1802 for ninety-nine years, terminable on the death of certain lives, of which

(1) 30 & 31 Vict. c. 142, s. 11:—"All actions of ejectment where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year, may be brought and prosecuted in the county court of the district in which the lands, tenements, or hereditaments are situate."

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the defendant Cocking was the last survivor, at the yearly rent of 10s. 6d., with a proviso for re-entry if the premises were suffered to be ruinous or in decay to the amount of 2l., and should not be amended within six months after notice from the lessor. In 1865 the premises were conveyed to the plaintiff in fee subject to the lease, the defendant Cocking being then entitled as lessee; the other defendants were his sub-lessees.

The premises consisted of three small houses, the aggregate rent of which, payable to the defendant Cocking, was 24l.; and it was contended by the defendant that the rent being above 20l., the county court had no jurisdiction; the judge overruled the objection, and went into the question of value. Evidence was given by the plaintiff (contradicted by evidence for the defendant) that the annual value of the premises was about 16l., and that the rent of 20l. was reserved on one of the houses, because it was let partially furnished for the purpose of the sub-tenant using it as a tramps' lodging house. The forfeiture having been proved, the judge gave judgment for the plaintiff.

H. T. Cole, Q.C., and *Lopes*, shewed cause. The jurisdiction of the county court in ejectment is given by 30 & 31 Vict. c. 142, s. 11, when neither the value of the premises nor the rent payable in respect thereof exceed 20l. by the year. "Rent payable" means the rent as between the litigant parties, otherwise a plaintiff could never be safe in bringing ejectment in a county court, as he cannot know what rent a sub-lessee may be paying; neither can "value" mean the improved value.

[THE COURT intimated that the actual value must be meant by value.]

Then the original rent reserved being only 10s. 6d., it was a question of fact for the judge, what was the real value of the premises, and the judge having decided on *conflicting evidence* that the value was less than 20l., the Court will not interfere: per Coleridge J., in *Joseph* v. *Henry* (1); *In re Bowen* (2); *Lexden Union* v. *Southgate.* (3)

[LUSH, J., referred to *Reg.* v. *Allen.* (4)]

(1) 19 L. J. (Q.B.) 369; 1 L. M. & P. 383.

(2) 21 L. J. (Q.B.) 10.

(3) 23 L. J. (Ex.) 316; 10 Ex. 201.

(4) 7 B. & S. 902; Law Rep. 2 Q. B. 114, nom. *Ex parte Vaughan.*

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If, however, the Court will entertain the question, it is impossible they can, on the conflicting evidence, say the judge was wrong.

Inderwick, in support of the rule. The rent must be the rent actually paid, as a conclusive criterion of value; if there is not any rent, then the value must be ascertained.

[LUSH, J. By 19 & 20 Vict. c. 108, s. 50, jurisdiction is given to the county court in a suit to recover small tenements "where neither the value of the premises *nor the rent payable in respect thereof*, shall have exceeded 50*l*." There the "rent payable" must be by the defendant to the plaintiff.]

That section is confined to cases between landlord and tenant; the present section applies to ejectment in general. Secondly, the Court will review the decision of an inferior court, where the decision sought to be impugned is not on the merits but on the collateral issue on which the jurisdiction of the inferior court depends. *In re Bowen* (1), the decision was on a fact in the case; so in *Reg.* v. *Allen* (2), the decision was not on a collateral issue but on the very point going to the merits. "It is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case, upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior court:" per Coleridge, J. delivering judgment of the Exchequer Chamber in *Bunbury* v. *Fuller*. (3) See also *Reg.* v. *Nunneley* (4), and other cases, cited in the notes to *Crepps* v. *Durden*. (5) Again in *Reg.* v. *Huntsworth* (6) it was expressly held, that the justices' decision, as to the want of the bona fides in an objection to a church rate on which their jurisdiction depended, must be overruled if contrary to the facts.

[LUSH, J. That turned on the words of the statute 53 Geo. 3,

(1) 21 L. J. (Q.B.) 10.

(2) 7 B. & S. 902; Law Rep. 2 Q.B. 114, nom. *Ex parte Vaughan*.

(3) 9 Ex. 111, 140; 23 L. J. (Ex.) 29, 35.

(4) E. B. & E. 852; 27 L. J. (M. C.) 260.

(5) 1 Sm. L. C. 6th ed. 693.

(6) 33 L. J. (M. C.) 131.

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c. 127, s. 7, which says if the rate be disputed the justices shall forbear to proceed in the case.

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COCKBURN, C.J. The evidence appears to have been nicely balanced, and the county court judge has decided one way on the evidence before him; how can this Court interfere? It cannot be denied that it was a question of fact for the judge to determine on the evidence, and when that is contradictory, his decision must be conclusive. We have a right to inquire whether he has properly investigated the facts going to his jurisdiction, but we cannot review his decision.]

Thompson v. *Ingham* (1), is an express authority in favour of the power of the Court to review in prohibition the decision of the inferior court on a collateral fact going to the jurisdiction; and that case is quite consistent with *Re Bowen*. (2)

COCKBURN, C.J. I am of opinion that the rule must be discharged. I think the judge was right on both points. First, he was right on the merits that the value of the premises was not above 20*l*. The value or rent must be the value or rent between the litigant parties, and it is not because one of the parties has created a different value or rent as between him and a third person that the other party is to be precluded. It may be that the value is greater than the rent reserved, and it would be so in most cases; but if the rent be not above 20*l*., the jurisdiction must depend upon the real value; and I cannot think that the legislature meant anything else than to permit an action for the recovery of land where of small value as between the parties, just as in any other case a right of suing is given where the amount of the cause of action is small. Further, whether the judge was right or wrong, he has determined the matter as a question of fact; and as it was incumbent on him to inquire into the matter, and decide, and as he has done so on the evidence before him we cannot review his decision. An inferior tribunal cannot give itself jurisdiction by deciding without evidence; on the other hand, it cannot refuse to go into evidence in order to ascertain whether it has or has not jurisdiction; and if it takes upon itself jurisdiction without evidence, or after refusing to go into evidence, and it turns out that

(1) 19 L. J. (Q.B.) 189; 14 Q. B. 710.
(2) 21 L. J. (Q.B.) 10.

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there was no jurisdiction, this Court will interfere by prohibition. But when the judge has gone into the inquiry, and has determined the question of fact, this Court cannot look to see whether the decision was, on the balance of evidence, right or not. We cannot review the decision of an inferior tribunal as though it were a verdict of a jury in an action in our own court. We have no jurisdiction of that kind. When the judge has gone into the evidence we are precluded from going into the matter, and are bound by his decision. Therefore, though I think on the facts and evidence the judge was right, I think it was not for us to decide the point.

LUSH, J. There are two questions. First, whether the judge put the right construction on the section; and I think he has. "The rent payable in respect thereof." Does that mean the rent payable by the defendant, the lessee, to the plaintiff, the lessor, or the rent payable by sub-tenants to the lessee? I think it clearly means the rent as between the litigant parties, the rent payable by the defendant to the plaintiff. It may be that the property has value above the rent reserved; and if it has, that also must not be more than 20*l.* in order to give jurisdiction to the county court. If the defendant gets more rent than 20*l.*, that may be a very good criterion of its value, but it is not conclusive; and it is for the judge to decide what in his judgment is the value. Then, secondly, can his decision as to the value be reviewed by prohibition? As to that there was evidence on both sides; and I think the judge's decision is conclusive when there was evidence before him on which he might decide as he has done. We cannot issue a prohibition unless it be clearly shewn that the inferior court has done something which it has not jurisdiction to do, which is not shewn here.

HANNEN, J. I think "the rent payable" must mean the rent payable between the litigant parties, not the rent payable by anybody. The argument for the contrary construction amounts to this, that the rent payable by a sub-lessee is to be conclusive as against the superior landlord as to the value. Then, if the rent as between the parties is less than 20*l.*, the next inquiry is, what is the actual value of the land sought to be recovered? The fact

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that somebody is paying more rent than 20*l.* is very strong evidence that the value is more than 20*l.*; but it is not conclusive; circumstances may explain it. The evidence in this case was that the rent was enhanced by the fact that some part of the premises were furnished. On the other point I have some little hesitation in saying that we are actually precluded from reviewing the decision of the judge on conflicting evidence; but without expressing any decided opinion on the point, I think that in a case of such nicety as the present we ought not to interfere with his decision.

Rule discharged.

Attorneys for plaintiff: *Gregory & Rowcliffes, for G. A. Jenkins, Penryn.*

Attorney for defendants: *Southgate.*

[IN THE EXCHEQUER CHAMBER.]

June 13.

THE QUEEN *v.* McCANN AND ANOTHER.

Poor-rate—Exemption of the Crown—Tolls of Bridge in occupation of Commissioners of Works and Buildings—43 Eliz. c. 2, s. 1.

The Commissioners of Works and Buildings were incorporated under certain statutes, and empowered to construct a bridge at Chelsea, and to borrow from the Treasury 120,000*l.* on an assignment of the tolls. The commissioners were authorized to take tolls, which were to be applied in payment of the expenses of the bridge, then in repayment of the sum borrowed, and when that had been repaid there was to be no toll charged for foot passengers. There was no ultimate appropriation of any surplus:—

Held, affirming the judgment of the Queen's Bench, that the commissioners were not liable to be rated to the relief of the poor, as they were in occupation of the bridge as servants of the Crown, deriving themselves no benefit from the receipt of the tolls; and were therefore exempt from the operation of 43 Eliz. c. 2, s. 1, as explained in *Jones* v. *Mersey Docks* (11 H. L. C. 443; 35 L. J. (M.C.) 1).

ERROR from the judgment of the Queen's Bench, in favour of the defendants on demurrer to the return to a mandamus: ante, p. 141.

Keane, Q.C. (with him *F. T. Streeten*), for the prosecution, urged the same arguments as in the court below. He cited the following cases:—*Jones* v. *Mersey Docks* (1); *Lord Amherst* v. *Lord*

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

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Sommers (1); *Rex* v. *Hurdis* (2); *Eckersall* v. *Briggs* (3); *De la Beche* v. *Vestry of St. James'* (4); *Reg.* v. *Temple* (5); *Reg.* v. *St. Martin's, Leicester* (6); *Reg.* v. *Sherford* (7); *Governors of Bristol Poor* v. *Waite* (8); *Reg.* v. *Wallingford Union.* (9)

Sir J. B. Karslake, A. G. (with him *McMahon*), was not called upon for the defendants.

KELLY, C.B. In this case a rate has been made upon the Commissioners of Her Majesty's Works and Public Buildings in respect of certain tolls received upon a bridge which has been constructed by the commissioners, who are made a corporation for that purpose, under certain acts of parliament.

It appears that some other commissioners had reported to the Crown in favour of certain improvements in or near the metropolis, and among others that a bridge should be erected upon or near the spot in question. For the purpose of erecting that bridge, an act of parliament was passed, authorizing a fund to be provided by the Crown to bear the expense of the construction of the bridge, and the receipt of the tolls, which were to be, in the first place, devoted to certain expenses connected with the works, and finally were to go to keeping the bridge in repair, and doing the other acts which are necessary to be done by reason of the undertaking, and to be applied in repayment of some very large sums to be advanced by the Treasury out of moneys in the hands of the Crown, or which were to be granted to the Crown by parliament, and which were applicable to public purposes; and whenever these sums should be repaid, then towards the diminution of the tolls; but no provision was made for the application of any surplus moneys arising from the receipt of the tolls which should be in the hands of these commissioners.

Now, these being the facts of the case, the question is, whether these commissioners are rateable in respect of these tolls to the poor rates of the parish in which the bridge, or a portion of the bridge, is situate. We are of opinion that they are not, and upon

(1) 2 T. R. 372.
(2) 3 T. R. 497.
(3) 4 T. R. 6.
(4) 4 E. & B. 385; 24 L. J. (M.C.) 74.
(5) 2 E. & B. 160; 22 L. J. (M.C.) 129.
(6) Law Rep. 2 Q. B. 493.
(7) Law Rep. 2 Q. B. 503.
(8) 5 Ad. & E. 1.
(9) 10 Ad. & E. 259.

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this plain and simple ground, that the occupation of this bridge is not a beneficial occupation, that is, it is not an occupation by any individual or any body of persons, whether for private or for public purposes, but it is in contemplation of law an occupation by the Crown, being an occupation of a government department, or public board, as servants of the Crown, that is, on behalf of the Crown itself.

The exception that was specially made in the judgment of the House of Lords in the *Mersey Docks Case* (1) was an exception in favour of property occupied by the Crown, or by the servants of the Crown, or any department of the government acting on behalf of the Crown. In this case, in the first place, the work is a public work which a report to the Crown by certain commissioners appointed by the Crown recommended should be constructed; and it was to be constructed by the Crown out of public funds, or, in other words, by the state and government of the country on behalf of and for the benefit of the public. For convenience, and convenience alone, the work was to be constructed actually, and the orders given, under the powers of an act of parliament. It was to be executed, not by the Crown itself in its own person, which would, of course, be the sovereign herself in her own person, which would be impracticable and impossible, but by the department of the government to which works of that nature are assigned in the ordinary carrying on and execution of the business of the country. If it had been a work connected with the navy, the board by which it would have to be carried out would, in all probability, have been the Board of Admiralty. If it had been the construction of a port, or anything relating to the commerce of the country, probably it would have been the Board of Trade; but as it happens to be a work to be executed upon what was claimed to be the property of the Crown, and which must at least be taken to form part of the property of the Crown, it was naturally left in the hands of that department which deals with the property of the Crown, and which executes works, or contracts for the execution of works, connected with the land or other property of the Crown, namely, the Commissioners of Woods and Forests. The task was, therefore, committed to the Commis-

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

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sioners of Woods and Forests, and the powers in question are conferred upon those commissioners; and for that purpose, and for that purpose only, and for that reason, and for that reason only, they are made a corporation. It is quite clear that upon this footing they entered into the occupation of property claimed to be the property of the Crown, upon which they constructed the whole or part of the bridge in question, and in respect of passengers and vehicles upon the bridge, they are entitled, under the act of parliament, to receive certain tolls.

In what character, then, or on whose behalf, do they occupy this bridge and receive these tolls? They do so certainly not for their own benefit. It is merely because they happen to constitute that department of the government to which public works of all descriptions to be executed by the Crown are invariably and necessarily committed. It is in that character, and that character only, that they occupy the bridge and receive the tolls in question. They are bound, under the act of parliament, to apply those tolls to the specific purposes pointed out by the act. If there should be a surplus, that surplus really is money belonging to the Crown, and they could not apply one shilling of it without the authority of the Crown.

There is no doubt, as has been suggested in answer to a question from myself to the Attorney-General, that the whole 80,000*l.* has not yet been paid off. I believe only 13,500*l.*, or some such sum, has been paid off. But, in case there shall arise a surplus, which surplus will be in their hands, that surplus, no doubt, will be disposed of according to the provisions of an act of parliament yet to be passed. In the meantime this corporation would hold that money on behalf of the Crown. It would be public money belonging to nobody but the Crown, and they would be trustees of that money until it was appropriated by the Crown, or the proper authorities, under the sanction of an act of parliament.

But to return to the question of occupation, according to the strict terms of the statute of Elizabeth, and the substance and true effect of the decision in the *Mersey Docks Case* (1) by the House of Lords, there must be occupation other than an occupation by the Crown, or for and on behalf of the Crown. Here there is no

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.

such occupation. The occupation is by this public board or department of the government existing only under the appointment of the Crown, and under the authority of the Crown, and for the purposes of the state, and who exist, not only in the capacity conferred upon them, or created by this act of parliament, but in every capacity in which they act at all as a department of the government, as servants of the Crown, by and on behalf of the Crown, for the public benefit of the state.

Under these circumstances, there being no occupation, beneficial or otherwise, by any individual or body of persons other than an occupation by the Crown, or a department of the government, or servants of the Crown, acting for and on behalf of the Crown, we are all of opinion that the corporate body in question created by this act of parliament are not liable to be rated in respect of these tolls; and consequently the judgment of the Court will be in favour of the Crown.

We may observe, as is suggested by my Brother Bramwell, that when we look to the form in which this case comes before us, we find that it is upon a mandamus to the magistrates to issue their warrant to levy a certain sum of money, the amount of the rate in question, by distress and sale of the goods and chattels of the Commissioners of Works. They do not and cannot possess goods and chattels to the value of a single shilling except that which belongs to the Crown. The goods and chattels do not belong to them in their corporate capacity; they belong to them strictly for and on behalf of the Crown, and cannot be applied to any purpose except for the purposes of the Crown. Under these circumstances, really to order these magistrates to levy on the goods and chattels of these commissioners would be to order them to seize the goods and chattels of the Crown, which are held by a government department merely on behalf of the Crown, in order to satisfy this poor-rate.

Upon these grounds we are of opinion that the judgment of the Court of Queen's Bench should be affirmed.

BRAMWELL and CHANNELL, BB., and BYLES and MONTAGUE SMITH, JJ., concurred. *Judgment affirmed.*

Attorneys for prosecution: *G. Capron & Co.*

Attorney for defendants: *The Solicitor to the Board of Works.*

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June 16.

[IN THE EXCHEQUER CHAMBER.]

TULK *v.* THE METROPOLITAN BOARD OF WORKS.

Act for the Protection of Garden or Ornamental Grounds in Cities and Boroughs (26 *Vict. c.* 13), *ss.* 1 *and* 2—"*Garedn set apart otherwise than by revocable permission of Owners for use of the Inhabitants of a Square.*"

In 1786, the representatives of T. and P. respectively, being tenants in common in fee of the land and houses forming a square in London, with the garden in the middle, a decree in chancery for a partition was obtained, and a commission issued. The commissioners certified that the land and houses on the north side should be allotted to the P.s in fee, and the land and houses on the other three sides, together with the garden, to the T.s in fee; that the lessees of houses, &c. on the north side should continue to pay to the owners of the second allotment the sum reserved in their leases towards keeping up the square garden; and that the owners of the second allotment should for ever keep and maintain the garden in its then state as a pleasure ground. A decree was then made that the estates should be held in severalty, as allotted by the certificate; and mutual conveyances were executed accordingly, which recited the decrees and certificate: but there was no covenant on the part of the owners of the second allotment to keep up the square garden. At the time of the partition most of the leases granted by the original coparceners, under whom T. and P. claimed, were in existence, and the last lease did not expire till 1847, and in the leases there were covenants by the lessees to pay certain small annual sums towards keeping up the square garden, and covenants on the part of the lessors to apply them to that purpose.

In 1807, J. T., the then tenant for life, and his son, C. T., the tenant in tail in remainder, of the property in the second allotment, executed a conveyance (which was carried out by a recovery), by which C. T., the son, took in fee the hereditaments on the east and partly south side of the square and the square garden, and J. T. took the hereditaments on the west and the rest of the south side, and C. T. covenanted for himself, his heirs, &c., with J. T., his heirs, &c., for ever after to keep the square garden in its then state and in good repair, &c. In 1808, C. T. conveyed the square garden in fee to E., who covenanted with C. T., &c., to keep the garden in its then state, and that it should be lawful for J. T. and C. T., and their respective tenants, inhabitants of the square, on payment of a reasonable sum, to have keys and admission at all times into the garden.

Up to 1851 the garden was constantly used as a promenade and place of recreation by such of the inhabitants of the square as chose to pay a guinea or a guinea and a half per annum to the owners for the time being of the garden, for keys. After several mesne assignments, in 1851, the garden became vested in fee in W., who proposed to erect a building in it. L. T., the devisee from J. T. of all his share in the property conveyed to him by the deed of 1807, and the owners of most of the property in the square comprised in that deed opposed this, and by an agreement between them and W. they granted him a licence to erect and maintain the proposed building for ten years, provided that the licence should not operate as a waiver of the covenants in the deeds of 1807 and 1808; and W. covenanted to restore the garden at the end of the ten years to its former state.

At the end of the ten years W. removed the building, and the plaintiff (who was also joint-devisee under the will of L. T. of J. T.'s share), as heir-at-law of L. T., exercised an option, given to L. T. in the agreement of 1851, of purchasing an undivided moiety of the garden; and the garden accordingly, by a deed of 1861, became vested in the plaintiff and W. as tenants in common in fee.

The owners of the houses on the north side of the square were no parties to any dealing with the garden.

In 1865, the garden being in a neglected and dilapidated state, the Metropolitan Board of Works took possession of it, under 26 Vict. c. 13, s. 1, which enacts that "where in any city or borough any enclosed garden or ornamental ground has been set apart, otherwise than by the revocable permission of the owner thereof, in any public square, &c., for the use or enjoyment of the inhabitants thereof, and where the trustees or other body appointed for the care of the same have neglected to keep it in proper order, or where such garden or ground has not been vested or placed under the management of trustees, &c., for the care of the same, and from want of such care or any other cause has been neglected, the Metropolitan Board of Works, where the same is within their jurisdiction (except in the city of London), and in any other city or borough the corporate authorities, shall take charge of the same, putting up a notice to that effect in such garden or ground;" the plaintiff having brought an action of trespass against the Board:—

Held, affirming the judgment of the Queen's Bench, that, whatever might be the rights at law or in equity of the owners and occupiers of the houses round the square, the garden had not been set apart for the use or enjoyment of the inhabitants of the square otherwise than by the revocable permission of the owner, within the meaning of the above section; and, that consequently the Board were trespassers.

Quære, whether the case was within the second section of the act.

ERROR from the judgment of the Queen's Bench in favour of the plaintiff on a special case: ante, p. 94.

Raymond, for the defendants, argued that the facts and various deeds set out in the case shewed that the square garden had been irrevocably set apart by the owners; and that it was a fallacy in the judgments in the Court below to say that the setting apart was not irrevocable because the covenantees might, at any time, release the covenantor. He cited *Tulk* v. *Moxhay*. (1)

[CHANNELL, B., referred to *Western* v. *Macdermott*. (2)]

Sir J. B. Karslake, A. G. (with him *Garth, Q.C.*, and *Pinder*), for the plaintiff, pointed out that the setting apart must be, not for the use of private individuals merely, but for the use of the inhabitants of the square; and that it did not appear from the case that one

(1) 11 Beav. 571; 2 Ph. 774; 18 L. J. (Ch.) 83.
(2) Law Rep. 2 Ch. Ap. 72.

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single inhabitant of the square had the right, quà inhabitant, of using the square garden.

Raymond, in reply, urged that though the several covenants were with individuals, that was sufficient if it substantially amounted to giving the use of enjoyment to the inhabitants; there was no mode of making a grant to an indefinite number of persons such as the inhabitants of a square.

KELLY, C.B. In this case we are of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. The question is, whether under s. 1 of 26 Vict. c. 13, the Metropolitan Board of Works were entitled to enter upon this garden, and to do the acts which they have proceeded to do, and which they contend were within the power conferred by that section. Now the words of the section raise the question plainly and at once. It recites that it is expedient to make provision for the protection and charge of the enclosed gardens or ornamental grounds which have been set apart for the use of the inhabitants of any public square, crescent, circus, street, or other public place. Then it proceeds to enact, that where in any city or borough an enclosed garden or ornamental garden has been set apart otherwise than by the revocable permission of the owner thereof in any public square, crescent, or circus, for the use and enjoyment of the inhabitants thereof, and the owner, trustees, or other persons to whom the property belongs are unmindful of the duty they owe to the inhabitants, and do not keep up and manage the square or garden in question properly, then the power claimed in this case shall be conferred on the Metropolitan Board of Works. Now the question, and it really is substantially the sole question in this case, is, whether the garden in this square, called Leicester Square, has been "set apart for the use or enjoyment of the inhabitants thereof." I am of opinion that in order to comply with these words, and to confer the power in question on the Board, some right, some legal right, must by some means or other have been conferred upon the inhabitants of the square or place in question, or some portion of the inhabitants, and the question is whether that has been done.

Now, if we look at the facts of this case, I think it will appear

as the result of all these conveyances, and all the acts done, that there exists not the slightest legal right of any kind or sort in any inhabitant of this square in the way of entering to use or enjoy the square garden.

It appears that before the years 1786—1791, the property in the houses all round the square garden, and the square garden itself, was vested in two families, or two persons of the names of Perry and Tulk, and at that time a bill was filed and a decree was made for a partition.

In that decree it was recited that it had been recommended by the commissioners, that there should be a covenant by Tulk (whose property upon the division of the estate the enclosed garden became) with Perry that he would for all time to come preserve and keep the garden as an enclosed ornamental garden I am not using, perhaps, the precise words of the instrument or the decree, but in substance that he should enter into a covenant for all time to come to preserve, keep, and maintain the piece of ground as an ornamental and enclosed garden. No words are added touching the lessees of the houses or of the inhabitants of the square.

Now it may be that the decree itself reciting these words and directing a partition accordingly, is equivalent to a covenant in the deed of partition afterwards executed between these parties. But supposing it not to be so, and that no obligation whatever was then imposed in respect of this piece of ground, the subsequent dealing which took place with respect to it shews that such a covenant was intended, inasmuch as one of the Tulk family entered into a covenant with another of the Tulk family, which would have substantially the same effect as a covenant entered into by the deed of partition. Assuming there was a covenant, what happens afterwards? It is remarkable, that from that day to this, including a period of ten years during which some unsightly buildings, erected by Wyld, occupied the whole site or area of the square, no interference has ever taken place, and no complaint made by any of the Perry family against Tulk, Wyld, or any other person who had applied this square to very different purposes from that to which it was originally dedicated.

Passing on, we find by a series of transactions and conveyances to which I need not refer in detail, the square passed from one

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brother of the Tulk family, and then another sold it to a person of the name of Elms. It passed from Elms to Inderwick, from Inderwick to some one else, and then vested in Wyld, and we find without a complaint of the parties, without the inhabitants or any human being having interfered with it, except one of the Tulk family, he was permitted, and acting upon that permission he actually did keep within the square those buildings with which we are all pretty well acquainted, from having seen them with our own eyes, for a space of ten years, and during the whole of that time no attempt was made by any inhabitant to put a stop to this interference with what is now supposed to be his rights.

The state of the title is now this, that the square garden belongs in equal moieties, probably as tenants in common, to one of the Tulk family and to Mr. Wyld, and one or both of them I will assume (without going minutely into the effect of the conveyances one after another) entered into a covenant with other members of the Tulk family (it may be with the members of the Perry family, but they are no parties to this case), to keep and maintain this piece of ground as enclosed ornamental garden, commonly called a square. It is to be observed that no covenants exist, or are suggested, at all relative to the matter, except that there was one covenant under which some portion of the inhabitants—the occupiers of one portion of the houses belonging to one side of the square—were entitled to have the key of the square, and to use the garden on payment of a guinea or a guinea and a half a year. But neither in the conveyances, nor in any covenant existing or suggested, nor in any contract or instrument that appears or is referred to in the case, is there a single word or sentence which confers a right on any one inhabitant of any house surrounding the square garden, or in which any contract is entered into with any inhabitant of a house in the square, or with anybody else. The case rests entirely on a covenant by the owner of the land of the square garden to keep and maintain it as an ornamental garden.

Now, what is to follow under the enactment by virtue of which the defendants claim to act? I should say it was rather the subject of proceedings under s. 2 of the act than under s. 1. If the

first is supposed to apply to it, what would be the consequences? The defendants could call upon and compel Mr. Tulk, the plaintiff, to restore the square to a fit and proper condition, and to keep it as an enclosed ornamental garden, or what is commonly called a square, with gates, which are locked, and which prevent the access of any one, and he might perform his covenant, every covenant that is suggested to have existed at any time or exists now, by simply clearing away anything that might prevent it being an ornamental garden, and restore it to the condition of a square, but at the same time with gates under lock and key, with which he might exclude everybody. What is the power that is conferred by s. 1? The condition of the power is that the ground has been set apart for the use or enjoyment of the inhabitants, and the power is such as would follow naturally from that condition, viz., to give the owner notice to put the square into a proper condition, and if he fail to do so, to put it in a proper condition at his expense, but then to enter upon the square, and to take possession of it, to place it in the possession and under the management and control of the vestry of the parish, to enable them to make a rate on the inhabitants, to cause the inhabitants to contribute to the expense; or, if that proceeding is not adopted, then the extraordinary power is conferred on the Metropolitan Board of Works, to take possession of the ground, to vest the same in the vestry of the parish, or in a board or committee, who thenceforth shall take charge of and maintain the same. How? "As an open space or street, in such a manner as shall be the most advantageous to the public." To "take charge of and maintain it." That means to maintain it for all time to come as an open place or street in such a manner as to them shall seem most advantageous. Or if there are two proprietors of the piece of ground, we must assume that one shall be under the obligation to keep it as a square, but if he fail to do so, it is for the Board to have the power to take it out of their hands, to deprive them, substantially speaking, of the whole of the property, of the sole use to which property can be applied. Now the square is the property of one or two individuals, subject to a covenant to keep it as an ornamental garden, but instead of obliging them to do that, the Board are to take possession of it and throw it open, without compensa-

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tion to the proprietors, to the whole of the public, or it may be only to the inhabitants of the square without making any compensation, although the only instrument by which they can claim the power contemplates the payment of a guinea or a guinea and a half.

It is quite enough, without commenting further on the case, to look to the words of the section, and to say that it clearly appears, from the language adopted by the legislature, that it is only where some legal right has been conferred on the inhabitants of the square in question, and it has been set apart for the use and enjoyment of the inhabitants, under such circumstances as entitle the inhabitants as matter of right to the enjoyment of it,—it is only in a case like that that the power claimed by the Board can be exercised; and this is not such a case. The liability here only exists inter partes between the parties to the different deeds and conveyances. At the most, the liability imposed on the parties is to keep it as an ornamental garden, not to throw it open, even upon payment, to the inhabitants at large; giving the full effect to the words of the covenants that are employed in the different instruments, they give no right whatever beyond this. I am of opinion, and the rest of the Court agrees with me, that there must be some legal right conferred upon the inhabitants; and there is no legal right conferred on the inhabitants of the square to have the whole set apart for the use and enjoyment of the inhabitants; that the powers assumed by the Board cannot therefore be lawfully exercised, and consequently that the plaintiff is entitled to judgment, and that the judgment should be affirmed.

BRAMWELL, B. I am entirely of the same opinion. I would only add, that it is not to be assumed that we think it is open to the owners of the land to build upon it; that is quite a different thing from deciding that the defendants cannot proceed under the statute.

CHANNELL, B., BYLES and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *H. W. & N. Coulthurst.*
Attorney for defendants: *The Solicitor to the Board.*

RUDGE *v.* BOWMAN.

1868
June 24.

Company—Contract for Sale of Shares pending Winding up—Transfer of Shares after Winding-up Order—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 153.

Section 153 of the Companies Act, 1862,—which enacts that, when a company is being wound up subject to the supervision of the court, . . . every transfer of shares, made between the commencement of the winding up and the order for winding up shall, unless the Court otherwise orders, be void,—does not invalidate a contract for the sale of shares made in the interval, nor prevent a transfer being made after the order for winding up.

Declaration, first and fourth counts, that a joint stock company, limited, under the Companies Act, 1862, had been ordered on the 17th of March to be wound up under the supervision of the court of Chancery, on a petition presented on the 7th of March; that after the commencement of the winding up the plaintiff agreed to sell and the defendant to buy certain shares in the company, the defendant to pay or indemnify the plaintiff from all calls thereafter to be made whilst the defendant should be entitled to the shares; breach, that the defendant had not paid nor indemnified the plaintiff against a subsequent call. Fifth count, that after the company had been ordered to be wound up, the plaintiff and defendant, on the 5th of April, upon the terms agreed between them that the defendant should indemnify the plaintiff in respect of the shares, executed a deed of transfer by which the plaintiff sold and transferred and the defendant agreed to accept the shares, subject to the conditions on which the plaintiff then held them; breach, that a subsequent call had been made on the plaintiff which the defendant had not repaid the plaintiff.

The defendant pleaded, to the first and fourth counts, that the plaintiff did not execute a transfer of the shares to the defendant. To all the counts, that at the time of the making of the agreement and deed the plaintiff knew of the petition and of the commencement of the winding up, but the defendant was ignorant of them; that no sanction of the official liquidator or order of the court as to the sale or transfer of the shares had been obtained; that at the time of the making of the agreement and deed the plaintiff was not a member of the company, nor registered as such, of which the defendant was ignorant; that the defendant had not been registered or made a member of the company, and there had been no default on the part of the company in omitting his name from the register; and that the defendant never made any express agreement to pay or indemnify the plaintiff against any calls made upon the shares. On demurrer to the pleas:—

Held, that the pleas were bad, and the counts good.

First count, that the company hereinafter mentioned was formed and established under the Companies Act, 1862, and was duly ordered to be wound up by the Court of Chancery on a petition presented for that purpose, and after the commencement (as defined by the 84th section of the said act) of such winding up, it was agreed between the plaintiff and the defendant that the plaintiff

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should sell to the defendant and the defendant should buy of the plaintiff fifty shares in the Joint Stock Discount Company, Limited, at 2*l.* per share, payable by the defendant to the plaintiff, the defendant to indemnify the plaintiff from all calls thereafter to be made upon the shares whilst the defendant should be entitled thereto. Averment of all conditions precedent, &c. Breach, that the defendant has not indemnified the plaintiff from all calls thereafter made upon the said shares, and the plaintiff was forced and obliged to pay 375*l.* for a call thereafter made upon the shares whilst the defendant was entitled thereto, and has not been repaid the money so paid.

Second count, that before and at the making of the agreement hereinafter stated, the Joint Stock Discount Company, Limited, was a joint stock company, limited by shares, formed and established under the Companies Act, 1862, the shares in the company being transferable by deed; and A. K. Hichens, being a member of the company, and the holder of 350 shares in the company for a price for the same paid by the plaintiff, duly executed a deed whereby he transferred the shares to the plaintiff; and afterwards, and before the plaintiff had become a member of the company in respect of the shares, and before the plaintiff had been entered in the register of members of the company in respect of the shares, a petition was on the 7th of March, 1866, presented for winding up the company to the Court of Chancery, whereupon it was on the 17th of March, 1866, ordered by the court that the company should be wound up by the court; and after the commencement (as defined by the 84th section of the Companies Act, 1862) of the winding up, to wit, on the 15th of March, 1866, it was agreed by and between the plaintiff and the defendant that the plaintiff should sell his interest in fifty shares in the company to the defendant at 2*l.* per share, the plaintiff to transfer such interest to the defendant, and the defendant to indemnify the plaintiff from all calls thereafter to be made upon the shares whilst the defendant should continue entitled thereto; and pursuant to the agreement the plaintiff did transfer such interest to the defendant. Averment of all conditions precedent, &c. Yet the defendant has not indemnified the plaintiff from all calls thereafter made upon the said shares, concluding as in the first count.

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The third count was for money paid.

Fourth count, that the Joint Stock Discount Company, Limited, was a joint stock company limited by shares formed and established under the Companies Act, 1862, and on the 17th of March, 1866, the Court of Chancery ordered, on a petition for that purpose duly presented on the 7th of March, 1866, that the company should be wound up by the court; and after the commencement as defined by the said act of the said winding up it was agreed by and between the plaintiff and the defendant that the defendant should buy of the plaintiff and the plaintiff sell to the defendant fifty shares in the company, the defendant to bear and pay all calls to be thereafter made on or in respect of such shares to which he should become entitled from or through the plaintiff, in pursuance of the said contract, whilst the defendant should be so entitled; and all conditions entitling the plaintiff to recover in respect of the matters stated in this count have been fulfilled. Yet the defendant did not bear and pay a call thereafter made on, &c.

Fifth count, that the plaintiff and defendant respectively executed the following deed upon the terms agreed on between them, that the defendant should, whilst entitled to the shares therein mentioned, indemnify the plaintiff in respect of the shares therein mentioned:—"I, W. N. Rudge, of the stock exchange, London, gentleman, in consideration of the sum of 100*l.* paid to me by W. Bowman, of &c., do hereby bargain, sell, assign, and transfer to the said W. B. fifty shares [giving the numbers] of and in the undertaking called the Joint Stock Discount Company, Limited, to hold unto the said W. B., his executors, &c., subject to the several conditions on which I hold the same immediately before the execution hereof. And I, the said W. Bowman, do hereby agree to accept and take the said shares, subject to the conditions aforesaid. As witness our hands and seals this 5th day of April, 1866." And the said company was a joint stock company, limited by shares, formed and established under the said act, and had been before the execution of the said deed duly ordered by the Court of Chancery on a petition for that purpose duly presented to be wound up;—concluding as in the first count.

Pleas: 2. To the first count, that the plaintiff did not execute and deliver to the defendant a deed of transfer of the said shares,

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nor did the plaintiff transfer to the defendant the said shares, or any of them.

8. To the fourth count, that the plaintiff did not transfer to the defendant the said shares, or any of them.

12. To the first, second, fourth, and fifth counts, that the agreements therein mentioned were for the purchase of shares in the said company, and the defendant by such purchase intended to become a member of the company, and before the making of the agreements or any of them or of the said deed therein respectively alleged to have been made, a resolution of the company had been duly passed requiring the company to be wound up voluntarily under the said statute, and a petition had been duly presented to the Court of Chancery for the winding up of the company voluntarily under the supervision of the court and the winding up thereof had commenced within the meaning of the statute, and the company was afterwards wound up in pursuance of the resolution and petition. That before and at the time of making the alleged agreements and deed, and each of them, the plaintiff knew of the resolution and petition and of the commencement of the winding up of the company, but the defendant was wholly ignorant of them and each of them. That no sanction of the court or of the official liquidator of the company, or any other sanction to the sale or transfer of the said shares, or any of them, had been obtained before or at the time of the commencement of this action; nor had the said court made any order as to the shares or the sale or transfer thereof, or any of them; nor has any such sanction or order been obtained or made. That at the time of the making of the alleged agreements and deed, and each of them, the plaintiff was not a member of the company, nor registered as such, of which the defendant was ignorant at the time of the making of the alleged agreements and deed, and each of them. That the defendant has not been registered as, or made a member of, the company, and that there has been no default on the part of the company in omitting his name from the register of members of the company, or otherwise, in relation to the shares; and that he never made any express agreement to bear, or pay, or to indemnify the plaintiff from or against any calls made upon any of the said shares.

Demurrer to the second, eighth, and twelfth pleas, and joinder.

Replication to the twelfth plea, that the defendant did not at any time apply or take any steps or proceedings whatsoever for procuring himself to be made a member of the said company, or to be registered in respect of the said shares or any of them.

Demurrer and joinder.

Quain, Q.C. (with him *Philbrick*), for the plaintiff. The twelfth plea, which is pleaded to all the special counts, appears to be founded upon s. 153 of the Companies Act, 1862, 25 & 26 Vict. c. 89 (1); that section, however, only makes void all transfers of shares in a company in the interval between the petition for winding up and the order; but in the present case the agreement only was in that interval, and the transfer was not till after the order; there is nothing in the section to render such a transaction void.

[BLACKBURN, J. The transfer not being till after the order, the plaintiff would remain liable as a contributory, because the order fixes as contributories all who are members at the time it is made.]

The plaintiff remaining liable as a contributory, the contract of indemnity is perfectly legal, it does not affect the company in any way. In *Chapman* v. *Shepherd* (2) and *Whitehead* v. *Izod* (2), the Court of Common Pleas were unanimous in holding that a contract to buy shares made before the petition for winding up was not rendered illegal by s. 153. All that it amounts to is, that a transfer in the interval is void; but here the transfer was not till after the order. *Biederman* v. *Stone* (3) is a similar decision under s. 131, which relates to transfers after the commencement of a voluntary winding up. The twelfth plea, therefore, is no answer to the plaintiff's cause of action, and is bad.

The Court then called upon

Macnamara (with him *T. Salter*), for the defendant. The twelfth plea shews that the defendant entered into the agreement with the

(1) 25 & 26 Vict. c. 89, s. 153:— "Where any company is being wound up by the court, or subject to the supervision of the court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding up" [the time of the presenting of the petition, s. 84], "and the order for winding up, shall, unless the court otherwise orders, be void."

(2) Law Rep. 2 C. P. 228.

(3) Law Rep. 2 C. P. 504.

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intention of becoming a member of the company, and without any knowledge on his part of the winding up; and that by reason of the winding up he was unable to get himself put on the register and so becoming a member; the implied promise, therefore, to indemnify the seller cannot attach where the transfer, the consideration for the promise, is not made owing to the default of the seller. In *Walker* v. *Bartlett* (1) it was held, on the principle of *Burnett* v. *Lynch* (2), that there was an implied promise, on the part of the transferee, to indemnify the transferor against subsequent calls, although it was not incumbent on him to get himself registered; but in that case the transferor had done all that was necessary on his part by executing a transfer in blank; so that the transferee had the commodum, and therefore ought to bear the onus. In the present case there is no means by which the defendant can get on the register; s. 35, as to rectifying the register, only applies when there has been default in the company (see per Lord Cairns, L.J., in *Ward and Henry's Case*) (3); which default is negatived in the present case; and, by s. 23, a shareholder can only become a member by having his name entered on the register. The defendant therefore is not and cannot become a member. The plea further shews, as, indeed, appears on the counts, that the sale was after the commencement of the winding up, and by ss. 131 and 153, the sale of shares is void without the sanction of the liquidators or order of the Court; and no contract of indemnity can be inferred from a void sale. It is observable that s. 131 makes any transfer void after the commencement of the winding up.

[LUSH, J. Section 153 is the section which applies to this case, a winding up under the supervision of the Court; and that section only makes a transfer void in the interval between the petition and the order.]

The action is founded on the contract of sale, which was in the interval. In *Bermingham* v. *Sheridan* (4) the Master of the Rolls, after adverting to a passage cited from Lindley on Partnership, p. 608, 1st ed., as fully justified by the authorities, continues:— "But it only amounts to this: That, in all cases where shares are

(1) 18 C. B. 845; 25 L. J. (C.P.) 263.

(2) 5 B. & C. 589.

(3) Law Rep. 2 Ch. Ap. 431.

(4) 33 Beav. 660, 665; 33 L. J. (Ch.) 571, 573.

sold by a shareholder to another person, the duty of providing for calls falls on the purchaser from the date of the contract. But that proposition assumes that the contract is duly carried into execution by the ultimate introduction of the purchaser's name upon the list of shareholders. . . But unless the contract for sale can be carried into effect, that liability cannot in the absence of an express stipulation attach, because the person who agrees to purchase the shares is not the purchaser in the proper sense of the word, for he is not allowed to become a shareholder."

[LUSH, J. But, for all that appears on this record, the defendant might have been put upon the register.]

No: the authority of Lord Cairns is against that, as there was no default in the company.

[BLACKBURN, J. I can quite understand that if there has been no default in the company, the court would not exercise its power to put an insolvent transferee on the register; but why should they not order the rectification of the register by putting a solvent vendee upon it?

LUSH, J. Section 98 clearly gives power to the Court of Chancery to rectify the register; suppose the transfer had been in the interval, and the court had approved it?]

That approval is negatived in the twelfth plea; though, possibly, the court might have made this sale valid if it had thought proper; *Emmerson's Case* (1): but that case is a direct authority that a contract to purchase shares in ignorance of the petition for winding up the company is invalid, and cannot be enforced against the purchaser, overruling the decision of the Master of the Rolls to the contrary. (2) It is alleged that the defendant was ignorant of the petition and order, and so this contract is invalid, and the implied indemnity cannot be enforced.

[LUSH, J. The fifth count sets out the deed of transfer; do not the terms of it amount to an express indemnity?]

[He then proceeded to the second and eighth pleas, but gave them up on Blackburn, J. intimating that it was clear that the plaintiff was not bound to execute a transfer himself: a transfer from a third person would do; moreover, the plaintiff might have been ready and willing, and the defendant refused.]

(1) Law Rep. 1 Ch. Ap. 433. 12 Jur. N.S. 592. (2) Law Rep. 2 Eq. 231. 12 Jur. N.S. 494

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BLACKBURN, J. Unless there is some clause in the statute to the contrary, I can see no reason why the transfer of shares should not be registered after a winding up order has been made. It is clear that subscribers to the memorandum of association and other persons who have agreed to become members are not complete members until they have been entered on the register of shareholders, but a transfer of shares may be registered at any time up to the time of the filing of a petition for winding up. Then s. 153 enacts as follows:—[The learned judge read the section.] The object of this section is obvious, inasmuch as when a petition has been filed any shareholder might transfer his shares to an insolvent person, and get him registered, so as to get rid of his own liability, and the register might thus be made to consist of persons who had nothing to lose, the legislature intervenes, and says, that between the petition and the order no transfer of shares shall take place, unless the court otherwise orders. The clause as to the alteration of the status of members I do not quite understand; for instance, death or marriage is rather beyond the power of the legislature. But whatever this may mean, a transfer may be made even in the interval if the court chooses to sanction it; and I have no doubt the court would allow a transfer from a pauper to a rich man to be registered, although not the converse. As soon as the list of contributories is fixed, although no transfer can be made till after that, I see no objection in substance to a transfer of shares. If a man choose to speculate in the shares of a company being wound up on the chance of making a profit, and the holder is willing to sell, what is there in point of law forbidding such a bargain, or what is there in the statute which says such a bargain shall not take place? The seller would still remain a contributory; and there is no section in the statute which says a contributory may not bargain as to shares; nor do I see why one of the terms of the bargain should not be a contract of indemnity; not altering in any way the liability of the transferor to the company, but giving him a right of indemnity over against his vendee if he be called upon by the company to pay any call. When once one arrives at this conclusion, it follows that all the pleas are bad, and all the counts good. The first and second counts state the agreement to have taken place after the petition, and before the

order, and to be, that the plaintiff would sell and the defendant buy fifty shares on the condition that the defendant should indemnify the plaintiff against all future calls; the fourth count alleges the agreement to be, that the defendant should pay all calls; and the fifth count sets the transfer out, which is, that the defendant is to hold the shares subject to the conditions on which the plaintiff held them immediately before the execution of the transfer. If a transfer can be made after the order for winding up, all those counts are good. Then the second and eighth pleas are bad: under a contract to sell shares it was not necessary that the defendant should himself transfer them. [The learned judge then read the twelfth plea.] As to the allegation that the defendant intended to become a member, but has not been registered, I have already disposed of this by shewing that there is no reason why he should not now be registered. As to the allegation that the defendant did not know of the petition, that only amounts to a fragment of an allegation of fraud; it does not go on to allege that the plaintiff knew of the defendant's ignorance. Then as to the allegation that the sanction of the court has not been obtained for the sale and transfer, the answer is, that no such sanction is now requisite. The fact that the plaintiff was not a member of the company, and that the defendant was ignorant of this, does not alter the contract, though it may the amount of damages. Then as to the allegation that the defendant never made any express agreement to pay or indemnify the plaintiff against future calls, that, as my Brother Lush pointed out, does not seem quite consistent with the contract of transfer set out in the fifth count; but, at any rate, in order to make this a good defence, the defendant must negative positively every possible state of circumstances from which such a contract to indemnify would be implied either by law or by a jury. On the whole plea, therefore, there is no allegation which affords the defendant a valid ground of defence.

LUSH, J. I am of the same opinion. The first, second, and fourth counts allege, as part of the contract of sale, a contract on the part of the defendant to pay or indemnify the plaintiff against calls. The twelfth plea alleges that the defendant made no express contract to that effect, and it professes to state facts to exclude

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such a contract by implication; but it is quite consistent with the facts that there may have been a contract implying such a condition. The first part of the plea contains a number of different allegations, none of which amount to a defence. First, I think the contract of sale was not within the prohibition of s. 153. Then there is not sufficient allegation as to the defendant's ignorance to amount to a plea of fraud in the plaintiff. Then it is said no sanction of the court has been obtained; that is not necessary; s. 153 does not avoid such a contract, but only makes a transfer in the interval between the petition and order void. Then the plea says, the plaintiff was not a member of the company; he might have been liable as a contributory, and so might be put on the register. Then it is alleged that the defendant has not been made a member of the company, and that he has not been put on the register, and this without any default in the company; this may be, but there is nothing in this allegation to exclude the implication of a contract to indemnify the plaintiff. As to the fifth count, there is an express clause in the transfer that the defendant is to take the shares subject to the conditions on which the plaintiff held them; and in the case cited (1) it was held that where the assignee accepted the assignment subject to the terms of the original lease, there was an implied contract on his part to indemnify the lessee from all consequences of a breach of the covenants in the lease. As to the other two pleas, they are clearly bad.

Judgment for the plaintiff.

Attorneys for plaintiff: *Vallance & Vallance.*
Attorneys for defendant: *Stephens & Matthews.*

(1) *Burnett* v. *Lynch*, 5 B. & C. 589.

GARNETT AND OTHERS, APPELLANTS; BACKHOUSE, RESPONDENT; ROLLE, APPELLANT; WHYTE, RESPONDENT.

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May 28.

Salmon Fishery Act, 1865 (28 & 29 *Vict. c.* 121), *Costs of Appeal under.*

The Salmon Fishery Act, 1865, s. 45, gives an appeal to one of the superior courts to any person aggrieved by the decision of the commissioners, and the provisions of 20 & 21 Vict. c. 43, as to the powers of the Court, are to apply, unless varied, to such appeal. The owner of a fishing-weir having been summoned before the commissioners, and his weir decided to be illegal, he appealed, on which a case was stated by the commissioners, and a person, who had taken part against the legality of the weir in the proceedings before the commissioners, was made respondent, and on argument of the case was represented by counsel. The Court having given judgment for the appellant:—

Held, that the Court had power to grant costs against the respondent, under 20 & 21 Vict. c. 43, s. 6, although he was not strictly a complainant or prosecutor, the proceedings being initiated by the commissioners themselves.

IN the first case a rule had been obtained by the respondent calling on the appellants to shew cause why the rule drawn up in pursuance of the judgment of the Court (ante, p. 30) should not be amended by striking out so much of it as ordered the respondent to pay to the appellants their costs.

In the second case a rule had been obtained by the appellant, calling on the respondent to shew cause why the rule drawn up in pursuance of the judgment of the Court (ante, p. 286) should not be amended by ordering the respondent to pay to the appellant his costs.

Both were cases stated by the commissioners under the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121) (1), and in each of them

(1) The Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), after reciting that by s. 33 of the Salmon Fishery Act, 1861, it is provided that it shall be lawful for the justices at any general or quarter sessions of the peace, from time to time, to appoint conservators or overseers for the preservation of salmon, and enforcing for that purpose the provisions of the said act within the limits of the jurisdiction of such justices. And that no funds are provided by the said act for carrying into effect the purposes thereof, and that it is expedient to amend the Act, &c., enacts

s. 27. A board of conservators shall have power within their district to do the following things, or such of them as they may in their discretion think expedient:—(4) To take legal proceedings against persons violating the provisions of the Salmon Fishery Acts, 1861, 1865, or either of them, or for removing such weirs or other fixed engines as they may be advised are illegal.

s. 42. Subject to such appeal as

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the commissioners had decided against the legality of certain weirs, &c., and judgment on each appeal was given in favour of the appel-

is hereinafter mentioned, the commissioners may inquire into the legality of all fishing-weirs and fishing mill-dams throughout the limits of the Salmon Fishery Acts, 1861 and 1865, and shall remove such fishing-weirs, and cause to be rendered incapable of catching fish such fishing mill-dams as are in contravention of the Salmon Fishery Act, 1861. . . .

s. 43. The commissioners shall advertise in some daily morning London newspaper, and in some newspaper circulating in the district in which any salmon river, or part of a river, is situate, notice of the place where, and time when, they will be prepared to hold a court for determining the legality of all fishing-weirs, fishing mill-dams, and fixed engines on that river, or part of a river . . . In addition to the foregoing advertisements, the commissioners at least fourteen clear days before entering upon an inquiry as to the legality of any fishing-weir, fishing mill-dam, or fixed engine, shall serve a notice on the owner, or one of the owners, of such fishing-weir, &c., to appear before them at a place and time mentioned in such notice. . . . .

s. 44. On the appearance of the owner, or other persons for or against any fishing-weir, fishing mill-dam, or fixed engine, and after hearing what, if anything, is alleged by him or them, or on his or their behalf, or in the absence of any such persons, if they or any of them do not appear, and the commissioners are satisfied by evidence on oath that the notices required by the act have been given, the commissioners shall decide as to the legality or illegality of the fishing-weir, . . . mill-dam, or fixed engine. . . . .

s. 45. If any person feels aggrieved with any decision of the commissioners the person aggrieved may appeal as follows:—1. The appeal shall be to one of the superior courts of law at Westminster. 2. The appeal shall be by special case, stating the facts and the grounds for the decision. 3. The special case shall be settled by the commissioners upon the application of the appellant . . . 4. Before the delivery of the case to the appellant he shall enter into a recognizance before the commissioners or a justice of the peace, with or without sureties, and in such sum as the commissioners or the justices think fit, conditional to prosecute without delay the appeal, and to submit to the judgment of the appellate court, and to pay such costs as may be awarded . . . 9. Save as hereinbefore varied, the provisions of the Summary Jurisdiction Act, 20 & 21 Vict. c. 43, as to the powers of the superior court, as to directing a special case to be stated, as to the enforcing the recognizances, and as to all other matters, shall apply to an appeal under this section in the same manner as if the words "justice or justices" in the said Summary Jurisdiction Act included the special commissioners appointed under this act."

20 & 21 Vict. c. 43, s. 6:—"The Court to which a case is transmitted under this act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices with the opinion of the Court thereon, or may make such other order in relation to the matter, and may make such orders as to costs as to the Court may seem fit; and all such orders

lants; the facts of each case are given, ante, pp. 30, 286, respectively; no affidavits were used on the present motions.

May 6. *Mellish, Q.C.*, and *Jordan*, shewed cause in the first case. By 28 & 29 Vict. c. 121, s. 45, subs. 9, the provisions of 20 & 21 Vict. c. 43, as to the power of the Court, unless varied, are to apply to an appeal under the act, and by s. 6 of 20 & 21 Vict. c. 43, the Court may make such order as to costs as they think fit. Although the commissioners may set on foot an inquiry, and there need not necessarily be a prosecutor as in cases before magistrates, yet if a conservator or other person chooses to interpose against the legality of weirs, &c., he may, and he then puts himself in the position of prosecutor. Thus s. 44 contemplates a person appearing for or *against* any fishing-weir, and s. 45 gives an appeal to *any person* aggrieved by the decision of the commissioners, and the decision may be in favour of a weir. So s. 41 gives an appeal against a certificate of the commissioners in favour of a fixed engine. The present respondent makes no affidavit that he was not a party to the appeal; it appears from par. 10 of the case (ante, p. 33), that he took part against the weirs, &c., in the proceedings before the commissioners, and he appeared by counsel on the argument of the case; he cannot now turn round and say he is not liable to costs. In *Moore* v. *Smith* (1), it is shewn that s. 6 as to costs applies even to an officer of the Crown.

Sir J. B. Karslake, A. G., supported the rule in the first case, and shewed cause against the rule in the second case. By s. 42 the commissioners may inquire into the legality of all fishing-weirs, &c., mero motu, and the forms in the second schedule of advertisement and notice mention only the persons interested in the weirs, &c. Under the 20 & 21 Vict. c. 43, there must be a respondent; s. 2 gives an appeal to either party in the proceeding.

[LUSH, J. By 28 & 29 Vict. c. 121, s. 45, subs. 4, the appellant is to enter into a recognizance to prosecute the appeal and to pay such costs as may be awarded.]

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shall be final and conclusive on all parties: Provided always that no justice or justices of the peace who shall state and deliver a case in pursuance of this act shall be liable to any costs in respect or by reason of such appeal against his or their determination."

(1) 1 E. & E. 597; 28 L. J. (M.C.) 126.

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That may be; but it does not follow that a person by being called respondent subjects himself to costs. The distinction between the two acts is, that in one a respondent is expressly named; but in the Fishery Acts the word respondent does not once occur.

Cowie, in support of the rule in the second case, referred to par. 13 of the case, ante, p. 293, and cited *Reg.* v. *Purdey* (1), and *Wednesbury Local Board* v. *Stephenson* (2), as shewing that the commissioners themselves could not be deemed respondents.

BLACKBURN, J. I am of opinion that in the case of *Garnett* v. *Backhouse,* the Court had jurisdiction to order the respondent to pay the appellants' costs. The Salmon Fishery Act, 1861, s. 45, gives power of appeal to any person aggrieved by any decision of the commissioners. By subsection 9, save as hereinbefore varied, the provisions of 20 & 21 Vict. c. 43, as to the powers of the superior court, shall apply to an appeal under this section, in the same manner as if the words "justice or justices" in the prior act had included the commissioners under the present act. Now by 20 & 21 Vict. c. 43, s. 6, the Court, having determined the case on appeal, may make such order as to costs as to the Court may seem fit, provided that no justices who state the case shall be liable to any costs in respect of, or by reason of, the appeal. This provision as to costs is not taken away or varied by any of the enactments previous to s. 45 of the Fishery Act; and this Court has therefore power to make such order as to costs as we may think fit, provided we do not subject the commissioners to costs.

Then comes the question, was there in this case a respondent in fact, or could there be a respondent? It is said by counsel for the respondent, that the commissioners may institute proceedings, and give their decision, without the intervention of any prosecutor or complainant. But the board of conservators may appear as prosecutors and institute proceedings by s. 27, subs. 4; and any other person may take part in the proceedings before the commissioners, as appears from s. 44. So that there may be parties appearing on both sides, but not necessarily. By s. 43 the commissioners are to give notice to the owner before entering into any inquiry as to the legality of a weir, &c.; and then by s. 44, "on the appearance of

(1) 5 B. & S. 909; 34 L. J. (M.C.) 4. (2) 33 L. J. (M.C.) 111.

the owner or other persons for or against any fishing-weir," &c., "or in the absence of any such persons," the commissioners shall decide on the legality of the weir, &c.

It is clear, therefore, that there may be persons appearing on both sides, though I agree that there need not be. In the latter case, where there is an appeal, there might be considerable difficulty in saying who is to be made respondent; it is clear from *Reg.* v. *Purdey* (1), that the commissioners themselves cannot be respondents; but it is quite sufficient, in the present case, to say that there may be a respondent; suppose the case of a weir declared to be legal, in order to an appeal there must be an appellant other than the owner, and the owner would be respondent. Here the respondent appears to have conducted the proceedings before the commissioners, and appeared by counsel in this court, and I think we must treat him as a real respondent, and not as a mere nominal party. It is obvious, if there were no respondent, we should not grant costs against the appellant. But if there be a real respondent, we have power to grant costs. Possibly the commissioners would be right in inserting a nominal respondent in order to support their decision; but in the present case it would appear that the respondent was a person taking an active part in the proceedings, and there is no affidavit to the contrary; the rule will therefore be absolute.

In the case of *Rolle* v. *Whyte*, the rule was drawn up without any mention of costs, according to the practice when there has been a written judgment of the Court which is silent as to costs. All we can say in that case is, that we think the judges who formed the Court had power to give costs, but it is a question for them in the exercise of their discretion whether they will grant costs.

LUSH, J. I am of the same opinion. It is clear, on the scheme of the act, that the commissioners may initiate proceedings of their own mere motion, and in that case, if no one intervenes, it might not be right to put forward a respondent. But there may be a person taking an interest in the matter who may come forward and put himself in the position of prosecutor. By s. 27, the board of conservators have power to institute proceedings; and ss. 44, 45, assume that

(1) 5 B. & S. 909; 34 L. J. (M.C.) 4. 10 Jur. N.S. 153.

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there may be a person before the commissioners contesting as well as affirming the right to weirs, &c.; and where there are these parties on either side they are in a position to become appellants and respondents under 20 & 21 Vict. c. 43. Now in the present case the proceedings were instituted by the commissioners, but I think we must assume that the person who appeared before them to contest the legality of the weirs was a person interested and in the position of a prosecutor, and then 20 & 21 Vict. c. 43, s. 6, clearly gives us jurisdiction to grant costs against him; and in the first case the rule must be discharged.

May 28. THE COURT made the rule absolute in *Rolle* v. *Whyte*.

Rules accordingly.

Attorneys for appellant Garnett: *Reed & Co., for Sale, Shipman, Sedden, & Sale, Manchester.*

Attorneys for appellant Rolle: *Frere, Cholmeley, & Forster.*

Attorney for respondents: *The Solicitor to the Treasury.*

June 10.

THE QUEEN *v.* TUGWELL.

Municipal Corporation—Election of Town Councillor—Burgess Roll—Selection by Burgess of his Ward—Voting Paper—"Description" of Candidate—Quo warranto, Trial of—Rule of Court, Hilary Term, 1827—*Municipal Corporation Act* (5 & 6 *Wm.* 4, *c.* 76), *ss.* 32, 44, 142.

To a quo warranto information for exercising the office of town councillor of a borough, the defendant pleaded that he was elected councillor by a majority of votes of the burgesses, on which a traverse was taken that he was not so elected:—*Held*, that the relator might, at the trial, go into the validity of other votes recorded for the defendant, besides those to which objection had been specially made on obtaining the rule for the quo warranto, and that he was not tied down by the rule of Hilary Term, 1827, to those specific objections only.

The burgess roll, formed under ss. 15—22 of 5 & 6 Wm. 4, c. 76, is conclusive as to the persons entitled to vote, and the qualification of a voter on the roll cannot be questioned in a quo warranto against the person elected.

By s. 32, at the election of councillors the voting paper shall contain the Christian names and surnames of the persons for whom the burgess votes, with their places of abode and descriptions. By s. 142 no inaccurate description of any person, body corporate, or place, named . . . in any roll list, notice, or voting paper required by this act, shall hinder the full operation of this act in respect to

such person, &c., provided that the description of such person, &c., be such as to be commonly understood.

A voting paper contained the Christian name and surname of the candidate and his place of abode, and nothing more:—

Held, that this was not an inaccurate description, but a total omission of the description of the candidate, and was not cured by s. 142; and the vote was therefore invalid.

By s. 44 if any burgess shall be rated in respect of distinct premises in two or more wards, he shall be entitled to be enrolled and to vote in such one of the wards as he shall select, and not in more than one.

A burgess appeared on the roll both of the N. ward and S. ward, and voted in the S. ward:—

Held, that not having been objected to at the revision court, he was not bound to select his ward before the election, and that his vote was valid.

INFORMATION in the nature of quo warranto calling on the defendant to shew by what authority he claimed to have and use the office of town councillor of the borough of Scarborough.

Plea: That the defendant was duly qualified and duly elected for the South ward of the said borough by a majority of votes of the burgesses of the said ward according to the provisions of 5 & 6 Wm. 4, c. 76.

Replication, that the defendant was not elected as alleged.

Joinder in issue.

At the trial before Hannen, J., at the Yorkshire spring assizes, it appeared that the borough of Scarborough was divided into two wards, North ward and South ward, and at the election of town councillors on the 1st of November, 1867, for the South ward, there were three vacancies and six candidates, among whom were the defendant Tugwell and the relator Thomas Jackson. The defendant was the last of the successful candidates, having 281 votes, Jackson being the next candidate in order, having 279 votes, leaving the defendant in an apparent majority of two votes. The rule for the quo warranto had been obtained, on affidavits, specifying objections to four particular votes recorded for the defendant Tugwell, viz., that two of the supposed voters were dead, one was absent at sea, and a fourth voter had already voted for the North ward. In addition to these four objections, the relator sought to shew that other votes recorded for Tugwell were bad, and, inter alia, that certain voters who were on the burgess roll were not duly qualified.

A verdict was taken by consent for the Crown, with leave to

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move to enter it for the defendant, if the Court should be of opinion that it was not competent to the relator to go into other objections besides those on which the rule for the quo warranto had been obtained, or to question in a quo warranto the qualification of persons appearing on the burgess roll. And it was further agreed, that if the Court decided the first point in favour of the relator, it should be open on the argument of the rule to either party to question the validity of certain votes recorded for the other.

A rule having been obtained accordingly,

May 7. *Overend, Q.C.*, and *Shepherd*, shewed cause. As to the first point, the issue is whether or not the defendant was duly elected, and on that issue the prosecution is not confined to the objections specified in the affidavits on moving for the rule for the quo warranto, but is at liberty to shew generally that the defendant had not a majority of good votes, and therefore was not duly elected. The defendant will rely upon the rule of court, Hilary Term, 7 & 8 Geo. 4, 1827 (1), which is as follows: "Whereas much vexation and expense have been occasioned to defendants in informations in the nature of quo warranto by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the Court; now for providing a remedy in this behalf it is ordered that from henceforth the objections intended to be made to the title of the defendant shall be specified in the rule to shew cause, and that no objection not so specified shall be raised by the prosecutor on the pleadings without the special leave of the Court or some judge thereof." That rule was not intended to regulate the proceedings at the trial; it merely provides that the rule nisi shall contain a statement of the nature of the intended objections: *Reg.* v. *Preece* (2); *Reg.* v. *Thomas* (3); and consequently in *Reg.* v. *Edye* (4), a statement in the rule nisi, that the party against whom the application was made was not entitled to be appointed to the office, and that the relator was entitled, was held to be insufficient, as being too general. The rule, however, has no application to the present case. On the second point it will be contended that it is not com-

(1) Given in 6 B. & C. 267.
(2) 5 Q. B. 94.
(3) 8 A. & E. 183, 191.
(4) 12 Q. B. 936.

petent for the relator to go into the qualification of an elector on the burgess list. The general rule is that the title of corporate electors cannot be impeached through the medium of the person elected, where there are other means by which the title of the electors can be tried: *Reg.* v. *Mein.* (1) The law is correctly laid down in Grant on Corporations, p. 214, that "where the qualification of the electors depends on the tenure of a corporate office or place, that qualification cannot be questioned through the medium of proceedings impeaching the title of a person elected by them to any office, but where the qualification depends upon inhabitancy or any other circumstance which cannot be directly challenged by a legal proceeding, then from necessity it may be questioned and tried through such medium." The right of a burgess to be placed on the burgess roll depends on his possessing the qualification mentioned in s. 9 of 5 & 6 Wm. 4, c. 76, and *In re Armstrong* (2), shews that it is not in all cases that a quo warranto will be granted to try the right of a person to be on the burgess roll.

[MELLOR, J. A quo warranto is only one way of trying the question. The note to s. 18 of 5 & 6 Wm. 4, c. 76, in Rawlinson's Municipal Corporation Acts shews that the legislature have provided ample means to secure a proper revision of the burgess roll, and it seems to me that the intention was that the fact of the elector's name being on the burgess roll should be conclusive evidence of his right to vote.]

There is no decisive case on the point. The question was raised in *Rex* v. *Hughes* (3) but it became unnecessary to decide it. *Symmers* v. *The King* (4), and *Rex* v. *Smith* (5), are both commented on in that case, but in neither of them is there any precise rule laid down. In *Reg.* v. *Quayle* (6) one of the points made in shewing cause against a rule for a quo warranto was that the burgess roll could not be opened, and Lord Denman, C.J., in his judgment, says (7): "As to opening the burgess roll, the inconvenience may be very great, but it may well be doubted whether there would not be more mischief caused by our refusing to do so." From this it would appear that the Court were of opinion that the

(1) 3 T. R. 596.
(2) 25 L. J. (Q. B.) 238.
(3) 4 B. & C. 368.
(4) Cowp. 489.
(5) 5 M. & S. 271.
(6) 11 A. & E. 508.
(7) 11 A & E. at p. 511.

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qualification of burgesses on the burgess roll might be questioned; if this were not so, an election might be decided by persons who had no right to vote.

Field, Q.C., and *A. W. Simpson*, in support of the rule. By the rule of court, Hilary Term, 1827, the prosecutor is confined to the objections specified in the rule to shew cause against the issuing of the quo warranto, and he cannot afterwards take any other objections: *Reg.* v. *Thwaites.* (1) The object of the rule of court would be defeated if objections never made during the course of the proceedings were to be taken for the first time at the trial, and it would be impossible then to answer them.

[BLACKBURN, J. If the defendant is likely to be any way prejudiced, his remedy is to apply for particulars of the objections intended to be made at the trial. It is clear that the rule of court has no reference to the proceedings at the trial.]

It is quite true the record is general, but the defendant could not have pleaded in any other way: *Reg.* v. *Hammond.* (2) Secondly, the burgess roll cannot be opened at the trial. In 5 & 6 Wm. 4, c. 76, ss. 16—18, are enactments as to how the burgess lists are to be made out, and the sections carefully provide for the revision of the lists, and when revised, by s. 22, they form the burgess roll of the burgesses entitled to vote: the roll cannot therefore be questioned collaterally. [They were then stopped by the Court.]

BLACKBURN, J. I am of opinion that the first point argued in this case must be decided in favour of the Crown, and the other for the defendant.

The rule for the quo warranto was obtained on specific grounds, and on the affidavits the Court were satisfied that the relator Jackson had a majority of, at least, one vote over the defendant; the quo warranto therefore issued, and the defendant pleaded in effect that he was duly elected, to which there was a single replication traversing that allegation. At the trial it was contended that the relator was confined to the objections he had taken in the affidavits on moving for the rule, and the argument for the defendant rested on the rule of Hilary Term, 7 & 8 Geo. 4, 1827. (3)

(1) 1 E. & B. 704; 22 L. J. (Q.B.) 238.

(2) 17 Q. B. 772; 21 L. J. (Q.B.) 153.

(3) Given in 6 B. & C. 267.

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The statute of 9 Anne, c. 20, permits an information in the nature of quo warranto to be exhibited, with the leave of the Court, at the relation of any person desiring to prosecute the same against any person usurping any office in any borough; and when the information is granted and the defendant has pleaded, the Crown, by virtue of its prerogative, is entitled to plead several matters by way of replication. This led to much abuse, as in the case of *Rex* v. *M'Kay* (1), where sixteen general replications and thirty special replications were pleaded to the pleas. To remedy this mischief, the rule of Hilary Term, 1827, was made, which requires objections, intended to be made to the title of the defendant, to be specified in the rule to shew cause, and that no objection not so specified shall be raised by the prosecutor on the pleadings without the special leave of the Court. This is a pleading rule which says nothing about evidence. It was never intended where a single issue is raised to exclude any evidence which would support that issue. If the defendant is likely to be in any way prejudiced, he ought to have asked for particulars of objections, which, on a proper application, would have been granted.

On the second point, I think the legislature intended that the burgess roll should be conclusive. By s. 15 of 5 & 6 Wm. 4, c. 76, the overseers are to make out the burgess list, which must be duly published. By s. 17, persons omitted from the lists may claim to have their names inserted, and the names of persons not entitled to be on the list may be objected to, and the town clerk is to make out lists of claimants and lists of persons objected to, which must also be duly published. By s. 18, the mayor and two assessors are to revise the lists. By s. 22, the burgess lists revised by the mayor are to be delivered to the town clerk, who is to cause the burgess lists to be copied into one general list in a book, with every name numbered, and "every such book in which the said burgess lists shall have been copied shall be the burgess roll of the burgesses of such borough entitled to vote in the choice of councillors . . . of such borough." It is clear from these enactments, by which careful provision is made for revising the burgess lists, that the burgess roll ought to contain the names of all persons entitled to vote, and that no person whose name is not in the

(1) 4 B. & C. 351.

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roll can vote, and the legislature intended the burgess roll to be conclusive on the point. The only argument that can be suggested against this view is founded on s. 9, and it is said that it is only persons *duly* enrolled according to the provisions of that act who shall be burgesses of a borough; but I think that there is no weight in the argument as a careful provision is made for revising the lists. *Reg.* v. *Quayle* (1) only decided that the Court would not on affidavits go into the question as to which candidate had a majority of votes, but would leave the question to be tried on the quo warranto.

MELLOR, J. On the first point I entirely agree with my Brother Blackburn. With regard to the other point, I think that, on the ground of convenience, the burgess roll ought not to be opened. I think ss. 15 to 22 shew the mode in which objection can be made to the burgess lists, and how they are to be revised, and after their revision the burgess roll must be taken to contain the names of all persons entitled to vote; and there being an efficient mode in which to question the title of the electors, that mode and no other can be followed; and at an election the roll must be held conclusive.

HANNEN, J. I am of the same opinion. On the first point, with regard to the rule of Hilary Term, 1827, I think it is not applicable to this case. If the construction sought to be put upon it by the defendant were correct, it would be open to the one side to raise any number of objections, while the other would be tied down to the specific objections stated in the affidavits. *Reg.* v. *Thwaites* (2), is not applicable. The question there was, whether the objection to the vote was answered, and the Court discharged the rule. There is nothing in that decision to shew that if the quo warranto had issued the relator might not have adduced additional evidence at the trial. Secondly, it appears to me the whole purview of the sections cited by my Brother Blackburn is to make that which is done for the purpose of forming the burgess roll conclusive, and it was not intended that the burgess roll should be afterwards questioned.

(1) 11 A. & E. 508. (2) 1 E. & B. 704; 22 L. J. (Q.B.) 238.

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June 10. The decision of the Court on the first point having rendered it necessary to go into the objections to several votes recorded both for the defendant and the relator, the case was adjourned accordingly; and it was arranged that the decision of the Court should be taken on each class of objections seriatim.

By 5 & 6 Wm. 4, c. 76, s. 32, at the election of councillors every burgess may vote for any number of persons not exceeding the number of councillors to be chosen, by delivering to the presiding officer "a voting paper containing the Christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions." By s. 142, "no misnomer or inaccurate description of any person, body corporate, or place, named in any schedule to this act, or in any roll, list, notice, or voting paper required by this act, shall hinder the full operation of this act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place be such as to be commonly understood."

The relator, Thomas Jackson, was a physician, and nine of the voting papers in his favour gave his Christian name and surname and his place of abode accurately, but they contained no further "description."

Overend, Q.C., and *Shepherd*, for the relator. Taking the voting papers altogether the candidate is inaccurately described, but the "description" is such as to be commonly understood, and is therefore cured by s. 142, and the objection therefore cannot be sustained: *Reg.* v. *Thwaites* (1); *Reg.* v. *Spratley* (2); *Reg.* v. *Gregory*. (3)

[LUSH, J. The 22 Vict. c. 35, s. 6, requires the same particulars to be stated in the nomination papers: by that section candidates are to be nominated, and the nomination is to be "in writing, and shall state the Christian names and surnames of the persons nominated, with their respective places of abode and descriptions."]

That is so: and therefore it cannot be contended for a moment that there could be the slightest doubt as to who was intended by the voting papers.

Field, Q.C., and *A. W. Simpson*, for the defendant. In all the

(1) 1 E. & B. 704; 22 L. J. (Q.B.) 238. (2) 6 E. & B. 363; 25 L. J. (Q.B.) 257. 17 Jur. 712 (3) 1 E. & B. 600; 22 L. J. (Q.B.) 120. 17 Jur. 439

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cases cited there was a mere inaccuracy of description; in the present case there is a total omission of the "description," and that is not cured by s. 142. Section 6 of 22 Vict. c. 35 does not in any way do away with the necessity of the description in the voting papers, or render the present papers valid.

[LUSH, J. May not "description" of the person in s. 142 mean the whole description of him, including name and place of abode?]

In s. 32, "description" is something different from name or place of abode, and must mean profession, trade, or occupation, if the candidate has any, or his style if he has no occupation. And the judgment of Patteson, J., in *Reg.* v. *Coward* (1) shews that the place of abode is no part of the "description" of the person.

COCKBURN, C.J. I think these nine votes must be struck off. There cannot be the slightest doubt that everybody understood which candidate was meant by these voting papers, but the question is whether, as s. 32 has not been complied with, s. 142 cures the defect. Now this is not an inaccurate description, but a total omission of "description," which is one of the things required by s. 32, and the omission is not cured by s. 142, and is therefore fatal to the validity of the voting papers; no doubt there is a proviso that inaccuracy is not to vitiate, provided the description be such as to be commonly understood, but the words are not large enough to cure a total omission. It may be hard in the present case, but as s. 6 of 22 Vict. c. 35 requires the same particulars in a nomination paper, the same question might arise on the nomination paper, and the same construction must apply to both, and in the case of a nomination paper it is of great importance to have strict accuracy.

LUSH, J. It is an admitted fact that the particulars given in the voting papers are such that there could be no doubt who was meant. I am disposed to put a wider construction on the word "description," so that the omission to state the occupation of the candidate cannot be said to be a total omission of the "description." I do not, however, entertain an opinion sufficiently strong to induce me to dissent from the judgment of the rest of the Court.

(1) 16 Q. B. at p. 829; 20 L. J. (Q.B.) at p. 363.

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HANNEN, J. I have reluctantly come to the conclusion that these voting papers are invalid, notwithstanding there could be no doubt for whom they were meant to be given; and I have been led to this conclusion by the consideration that the same question might arise as to the nomination papers, and I cannot think it would be right to hold that a nomination paper was valid, notwithstanding a total omission of the description of the candidate.

Overend asked leave to point out that s. 142 did not apply to nomination papers.

HANNEN, J. The two Acts are to be read together.

By 5 & 6 Wm. 4, c. 76, s. 44, "if a burgess be rated in respect of distinct premises in two or more wards, he shall be entitled to be enrolled, and to vote in such one of the wards as he shall select, but not in more than one."

One of the burgesses of Scarborough was rated in both wards, and was enrolled for both, and at the election voted in the South ward for the defendant, but he had not previously voted in the North ward.

Overend, Q.C., for the relator. The burgess was not entitled to be enrolled for both wards. He ought to have made his selection at the revision before the mayor: *Reg.* v. *Mayor of Cambridge.* (1)

LUSH, J. There the burgess had been called upon to make his selection at the revision; but the burgess is not bound voluntarily to select before the election, and by voting in the South ward he made his selection: *Reg.* v. *Morton.* (2)

COCKBURN, C.J., and HANNEN, J., concurred in this view.

The relator being in a hopeless minority, his counsel declined to go into further objections.

Rule absolute.

Attorney for relator: *R. J. Child.*

Attorneys for defendant: *Edwards, Layton, & Jaques.*

(1) 1 E. & E. 210; 28 L. J. (Q.B.) 10.

(2) 4 Q. B. at p. 146.

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June 3.

Metropolis Management Acts, 18 & 19 *Vict. c.* 120, *ss.* 105, 250; 25 & 26 *Vict. c.* 102, *s.* 77—*Paving New Streets—Liability of Church—"Owner."*

A church, built on land conveyed to the commissioners for building additional churches, is not liable to be assessed to the expenses of forming a new street, either as "house," or "land," under the Metropolis Management Acts.

Semble, that the commissioners were not "owners" within the statutes.

Case stated by one of the metropolitan police magistrates under 20 & 21 Vict. c. 43.

The appellant appeared in answer to a summons obtained by the respondents, for that the appellant being the owner of certain premises in Warrington Gardens, in the parish of Paddington, abutting upon a new street about to be paved by the respondents, had neglected to pay the sum of 14*l.* 3*s.* 2*d.*, his share of the estimated expenses of such paving.

On the 19th of February, 1867, the following resolution was passed by the vestry of Paddington:—

"Warrington Gardens not being paved to the satisfaction of this vestry,—Resolved, that the same be forthwith paved throughout the whole breadth of the carriageway and footpaths thereof, and that the estimated expenses (amounting to 83*l.* 9*s.* 4*d.*) of providing and laying such pavement, and of paving the same be, and the same are hereby, apportioned to and charged upon the respective owners or occupiers of the land and houses bounding or abutting upon, or forming such street, in manner following, and that the same be demanded and recovered accordingly."

The amount was divided between the owners of each of the six houses in Warrington Gardens. It was admitted that the appellant was the owner of the house numbered one in Warrington Gardens; the charge upon which was 14*l.* 3*s.* 2*d.*

There is a church surrounded with land, opposite the row of houses mentioned in the resolution of the vestry, and abutting upon the road in question, and no occupiers or owners had been assessed in respect of this church and land, either as a house or land; and accordingly it was objected by the appellant that the resolution of the vestry was not in accordance with the provisions

of the Metropolis Local Management Amendment Act (25 & 26 Vict. c. 102), s. 77; and that the owners or occupiers of the houses referred to in the resolution (the same being on one side of the street only), were improperly assessed with the whole amount of the estimated cost of repairing such road. On the other hand it was contended, that it was not competent to question the legality of the resolution of the vestry in a proceeding under the above-mentioned act before one of the metropolitan magistrates. And it was also contended that the church was neither house nor land abutting upon the new road, within the meaning of the acts, and that no owner or occupier thereof could properly be assessed under the powers given by the acts. And that the owners or occupiers of the houses, although they were situate on one side only of the road, were properly assessed with the whole amount of the estimated cost of repairing the road. It was also contended that the road was a new street, within the meaning of the act.

The respondents put in evidence a certified copy extracted from the registry of the diocese of London, of a conveyance bearing date 13th of March, 1856, and made by the Right Rev. Charles James, late Bishop of London, under 6 Geo. 4, c. 45 (privately printed), to the commissioners for building additional churches, whereby the plot of land on which the church of St. Saviour, Paddington, now stands (which is the church in question), was given by the bishop to the commissioners and their successors, to be devoted when consecrated, to ecclesiastical purposes for ever, by virtue of the statutes 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; and 5 Geo. 4, c. 103. And the respondents also put in evidence a certified copy of an act of consecration of the said church, extracted from the registry of the diocese of London, from which it appeared that on the 12th of April, 1856, the Bishop of Oxford, under a commission from the late Bishop of London, consecrated the church for the celebration of divine service. The site of the church and the marginal land adjoining, together make up the plot of land conveyed by the late Bishop of London to the commissioners. (1)

(1) A plan of the site of the church was also put in, from which it appeared that the land not actually occupied by the church was a mere strip of land round each side of the church, in the broadest part only about thirty-two feet, and generally much narrower.

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The magistrate made an order that the appellant should pay the said sum of 14*l.* 3*s.* 2*d.*

If the Court should be of opinion that the resolution of the vestry and the apportionment of sums to be paid by the owners or occupiers of the houses and land abutting on the new road in Warrington Gardens, is bad in law, because no assessment has been made therein of owners or occupiers of the church abutting upon the road, or because the whole amount of the estimated cost of repairing such road has been assessed upon the owners or occupiers of the said houses referred to in the said resolution, the order was to be cancelled, but, if otherwise, it was to remain in force.

Dowdeswell, Q.C. (*Macnamara* with him), for the respondents. The question is, whether this church, with the small piece of land attached to it, is liable to contribute to the expense of paving the adjoining street, as "a house," under 18 & 19 Vict. c. 120, s. 105, or as "land" under 25 & 26 Vict. c. 102, s. 77. (1) "House," in

(1) The Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 77 :—"Where any vestry or district board shall, under the powers given by the 105th section of 18 & 19 Vict. c. 120, have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein : provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do ; and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable, either before the work shall be commenced, or during its progress, or after its completion ; and it shall be lawful for the vestry or district board at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years ; and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law, or in a summary manner before a justice of the peace, at the option of the vestry or board."

By s. 112, "new street" shall apply to and include all streets hereafter to be formed, and a part of any such street, and also all streets partly formed or laid out.

The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 105 :—"In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in

the former section, cannot include a church, unless made to do so by the interpretation clause, and there is no definition of house given in s. 250; and "land" in the subsequent statute means land unbuilt upon, which cannot include a church; and the piece of land attached is a mere strip round the church necessary for allowing a railing round the church, and would clearly pass under a conveyance of the building. Moreover, a church is not liable to this charge, because it is only charged on property liable to the poor-rate, and churches are expressly exempt by 3 & 4 Wm. 4, c. 30, s. 1. Moreover, there are no persons, in the case of a church, to whom the definition of "owner" in s. 250 can apply. [He was then stopped by the Court.]

J. Brown, Q.C. (*Patchett* with him), for the appellant. The church, unless excepted, must be chargeable to these expenses; "house" must be used in a much larger sense than dwelling house, otherwise warehouses, shops, stables, and other buildings would be exempt, in fact, house must be equivalent to building. In s. 162, places of religious worship are expressly exempted from the district rates; but there is no such exemption in s. 105.

[LUSH, J. That exemption was necessary in a section making public buildings rateable, lest it might be supposed that the exemption in 3 & 4 Wm. 4, c. 30, was intended to be repealed.]

A church is a "house" in one sense of the word; in the old precedents it is said burglary might be laid in a church as domus mansionalis Dei: 2 Russell on Crimes, p. 46, 4th ed. "Land," in 25 & 26 Vict. c. 102, s. 77, is not defined, and therefore will include

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which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same shall be so paved, then and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of such vestry or board,") &c.

By s. 250, "owner" shall mean the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.

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land with a building upon it. At all events, the land not built upon is chargeable.

COCKBURN, C.J. We are all of opinion that this order was right. It is sufficient to say that a church is neither a "house" nor "land" within the meaning of the statutes.

BLACKBURN, J. I am of the same opinion; and I would only add, that I cannot see how the commissioners for building additional churches can be said to be "owners" within the definition of the statute.

LUSH, J., concurred.

Judgment for the respondents.

Attorney for appellant: *T. J. Angell.*
Attorney for respondents: *F. J. Fuller.*

June 12.

THE QUEEN *v.* HAMILTON AND OTHERS, JUSTICES OF MIDDLESEX.

*Special Constables, Order for Expenses of—Jurisdiction of Justices of Petty Sessional Division—*1 *&* 2 *Wm.* 4, *c.* 41, *ss.* 1 *and* 13.

By 1 & 2 Wm. 4, c. 41, s. 1, if it shall be made to appear to two justices of any county, riding, or division having a separate commission of the peace, that a tumult or riot is apprehended within any parish or place within the division or limits for which the justices usually act, they are empowered to appoint special constables.

By s. 13, the justices acting for the division or limits within which the special constables have been called out, at a special session to be held for the purpose, are empowered to order the payment of the expenses of such constables, the order to be made on the treasurer of the county of which they are justices. Constables having been appointed and called out for the parish of M., within the M. petty sessional division of a county:—

Held, that an order for the expenses was rightly made at a special session of the justices usually acting in the petty sessional division, and need not be made at a special session of the whole body of justices for the county.

RULE calling on Sir James John Hamilton, Bart., and six others, justices of Middlesex, to shew cause why a certiorari should not issue to bring up an order of the 11th of May, 1868, made by them at a special session held in and for the Marylebone division of the said county, whereby the treasurer of the county was ordered to

pay 54*l.* 18*s.* 3*d.*, the amount of expenses incurred in providing staves and other necessary articles for persons residing in the parish of Marylebone who had been sworn in and acted as special constables in January and February, 1868.

The county of Middlesex was divided in 1853 into several petty sessional divisions, under 9 Geo. 4, c. 43, and 14 & 15 Vict. c. 55, s. 17, of which divisions Marylebone was one, being conterminous with the parish of St. Marylebone.

In December, 1867, information upon oath was made, under 1 & 2 Wm. 4, c. 41, s. 1 (1), before two justices acting for the petty

(1) 1 & 2 Wm. 4, c. 41, s. 1:—"In all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city, or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony has taken place, or may be reasonably apprehended, in any parish, township, or place situate within the division or limits for which the said respective justices usually act, and such justices shall be of opinion that the ordinary officers appointed for preserving the peace are not sufficient for the preservation of the peace, and for the protection of the inhabitants and the security of the property in any such parish, township, or place as aforesaid, then, and in every such case, such justices, or any two or more justices acting for the same division or limits, are hereby authorized to nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, to act as special constables for such time and in such manner as to the said justices respectively shall seem fit and necessary for the preservation of the public peace, and for the protection of the inhabitants and the security of the property in such parish, township, or place; and the justices of the peace who shall appoint any special constable by virtue of this act, or any one of them, or any other justice of the peace acting for the same division or limits, are and is hereby authorized to administer to every person so appointed the following oath," &c.

s. 13. "The justices of the peace acting for the division or limits within which any such special constables shall have been called out to serve, at a special session to be held for that purpose, or the major part of the justices at such special session, are hereby empowered to order from time to time such reasonable allowances for their trouble, loss of time, and expenses, to be paid to such special constables who shall have so served, or be then serving, as to the said justices or such major part of them shall seem proper; and the said justices or such major part of them may also order the payment of such expenses as may have been incurred in providing staves or other necessary articles for such special constables; and the said justices so ordering, if justices for any county, riding, or division having a separate commission of the peace, or if justices for any liberty, franchise, city, or town,

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sessional division of Marylebone, that there was reasonable ground for apprehending riots, &c., in the parish of St. Marylebone, and the justices accordingly issued their precept appointing certain persons residing in the parish special constables, and these persons were duly sworn in to act as special constables in January and February, 1868; and incidental expenses having been necessarily incurred for staves, &c., a special session was convened on the 11th of May, 1868, by notice to each of the justices of Middlesex acting for the Marylebone division, and the amount having been laid before them, the order in question was made by the justices then assembled, under 1 & 2 Wm. 4, c. 41, s. 13.

There being doubts whether the order should not have been made at a special session of the whole body of justices for the county, this rule was obtained on behalf of the treasurer of the county.

Poland shewed cause. The order was properly made at the special session for the Marylebone division. The question is, what is the meaning of "division or limits" in 1 & 2 Wm. 4, c. 41, s. 13? "Division" appears to be used in two different senses in ss. 1 and 13: first, as the division of a county having a separate commission of the peace; and, secondly, as a division for which justices usually act, in other words, a petty sessional division. It is clear that in the latter part of s. 1 the jurisdiction of the justices acting for any county or division is limited to such of them as usually act for the "division or limits" within which the parish or place where the

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which shall be contributory to the public rate for any county, riding, or division, shall make every order for the payment of such allowances and expenses upon the treasurer of such county, riding, or division, who is hereby required to pay the same out of any public money which shall then be in his hands, and the said treasurer shall be allowed all such payments in his accounts; and where the justices of the peace assembled at such special session are justices for any liberty, franchise, city, or town, which is not contributory to the public rate for any county, riding, or division, but which raises a rate or other similar fund in the nature of a county rate, in every such case the said last-mentioned justices shall make every order for the payment of such allowances and expenses as aforesaid upon the treasurer or other officer having the collection or disbursement of such last-mentioned rate or fund, who shall forthwith pay every such order out of such rate or fund, and shall be allowed all such payments in his accounts."

riot is apprehended is situate; and so, when s. 13 gives to the justices "acting for the division or limits" within which the special constables have been called out jurisdiction at a special session to be held for the purpose, to order the expenses, it is clear that by "division or limits" is meant the petty sessional division, and not the division having a separate commission of the peace.

[LUSH, J. In s. 13, "county or riding" do not occur in juxtaposition with division.]

Precisely: but when the section proceeds to say on whom the order is to be made, then those words do occur, and the order is to be made on the treasurer of the county, riding, or division having a separate commission. "Division or limits" is the very phrase used by 9 Geo. 4, c. 43, enabling new petty sessional divisions to be made. In *Evans* v. *Stevens* (1), the distinction is pointed out that "division" must mean a division having a separate commission of the peace, unless there is something in the context of the statute to shew that the legislature intended to use the word in a different sense. Here the context shews that intention. The special session was therefore duly convened by a notice to all the justices usually acting for the petty sessional division; which is the mode pointed out in Dickinson's Quarter Sessions, pp. 14—16, 5th ed.; and the order is consequently valid.

J. Brown, Q.C., and *Channell*, in support of the rule. The special sessions which can be held under 9 Geo. 4, c. 43, for petty sessional divisions created by that act cannot be convened for such a purpose as making an order like this. The construction contended for by the other side would cause extreme inconvenience and introduce anomalies: for different orders might thus be made for like purposes in each petty sessional division of a county. The case of *Reg.* v. *Hulton* (2), shews that "division or limits" in s. 13 cannot mean petty sessional division, for it was there held that an order for the expenses of special constables called out in the borough of Manchester, on the treasurer of the county of Lancaster, was valid, though made by justices of the borough, and need not be made by the justices of the Manchester petty sessional division of the county.

[BLACKBURN, J. "Division or limits," it may be conceded, need

(1) 4 T. R. 459, 462. (2) 13 Q. B. 592; 19 L. J. (M.C.) 32.

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not necessarily mean in all cases within the statute petty sessional division, but the question is whether in such a case as the present it does not mean that.]

COCKBURN, C.J. It is very clear that the justices for a county, riding, or division of a county, are to appoint special constables to act only in any parish, township, or place within the division or limits for which the particular justices usually act. "Division or limits" therefore means something else than a county, or division of a county, and may include a petty sessional division. Then in s. 13, "division or limits" must mean the same thing, as in the first section, and the order is therefore clearly to be by those justices of the county or division at large, who are acting for the particular division or limits within which the constables have been called out. It is further to be observed that the language used in 9 Geo. 4, c. 43, the statute by which power is given to the quarter sessions to alter or make these petty sessional divisions, is perfectly consistent with the language of the present Act. There can be no doubt therefore that this order was made at a proper special sessions, and is valid.

BLACKBURN and LUSH, JJ., concurred.

Rule discharged.

Attorneys for prosecution: *Allen & Son.*
Attorney for defendants: *H. Greenwell.*

THE NORTH EASTERN RAILWAY COMPANY, APPELLANTS; THE MAYOR, ALDERMEN, AND BURGESSES OF TYNEMOUTH, RESPONDENTS.

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July 3.

Public Health Act, 1848 (11 & 12 *Vict.* c. 63), *s.* 10—*Power of General Board of Health in applying parts of the Act to a district.*

By the Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 10), if after inquiry it shall appear to the General Board of Health expedient that the Act, or *any part thereof*, ... should be put in force within any city, town, borough, or place, in which any Local Act is in force, for paving, lighting, &c., they shall make a provisional order accordingly, with such provisions, regulations, conditions, and restrictions, with respect to the application and execution of this Act, or any part thereof, and with respect to such Local Act and its repeal, alteration, extension, or further execution of the same, and in all respects whatsoever as they may think necessary under all the circumstances of the case.

A Local Act was in force in the borough of T., and a provisional order was made under the above section; it was ordered that the Public Health Act, 1848, should apply and be in force throughout the borough, except s. 50, and so much of s. 88 as provides that the occupier of any land used as arable, meadow, or pasture ground only, &c., and the occupier of any land covered with water or used only as a canal or towing path, or as a railway constructed under any act of parliament for public conveyance, shall be assessed in one fourth only of the net rateable value; and the rating clauses of the Local Act were repealed, and others substituted, by which all hereditaments in a part of the district were to be rated upon two thirds of the rateable value. A railway company having been rated accordingly at two thirds in one part of the district and in the full rateable value in the rest of the district, in respect of their railway proper; on appeal:—

Held, that such a severing of s. 88 was not within the powers given by s. 10 to the General Board of Health.

CASE stated under 12 & 13 Vict. c. 43, s. 11, on appeal against two general district rates for the borough of Tynemouth.

The following is a short statement of the case:—

A Local Act (9 Geo. 4, c. xxxvii.), extended over the township of North Shields, and a part of each of the townships of Tynemouth, Chirton, and Preston, and by s. 74 the occupier of all lands, &c., in North Shields, of all detached houses not in a street, and all lands occupied solely as gardens or for husbandry throughout the district, were liable to be assessed to an annual rate in any sum not exceeding 1*s.* 4*d.* in the pound upon the full improved yearly value, and the occupiers of all other property in any sum not exceeding 2*s.* in the pound.

In 1849 Tynemouth was made a municipal borough by charter, under the provisions of 5 & 6 Wm. 4, c. 76, and it included, inter

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alia, the whole of the district, and the powers of the local commissioners were transferred to the corporation of the borough.

In 1851 a provisional order was made by the General Board of Health as to Tynemouth, purporting to be made under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 10 (1), and this order was ratified by 14 & 15 Vict. c. 103, s. 1, so far as it was authorized by the Public Health Act. The order (s. 5) repealed s. 74 of the Local Act, and (s. 13) extended the unrepealed parts of the Local Act to the whole borough. It applied (s. 2) the Public Health Act to the whole area of the borough; except s. 50, and so much of s. 88 (2) as provided "that the occupier of any land used

(1) 11 & 12 Vict. c. 63, s. 10:—"If after such inquiry or further inquiry as aforesaid, it appear to the said General Board of Health to be expedient that this act or any part thereof should be applied to the city, town, borough, parish, or place, with respect to which inquiry has been made, upon the petition of such inhabitants as aforesaid, within the same boundaries as those of such city, town, borough, parish, or place, and within which there is no local act of parliament in force for paving, lighting (otherwise than for the profit of proprietors or shareholders), cleansing, watching, regulating, supplying with water, or improving such city, town, borough, parish, or place, or any part thereof, or in anywise relating to the purposes of this act, they shall report to her Majesty accordingly; and at any time after presentation of such report it shall be lawful for her Majesty, by and with the advice of her Privy Council, to order that this act or any part thereof shall be applied to and be put in full force and operation within such city, town, borough, parish, or place; and if after such inquiry or further inquiry as aforesaid it appear to the said General Board to be expedient that this act, or any part thereof, should be put in force within boundaries not being the same as those of the city, town, borough, parish, or place from which the said petition proceeded; or within boundaries where no petition has been presented from such inhabitants as aforesaid, or within any city, town, borough, parish, or place in which any such local act of parliament as aforesaid is in force, they shall make a provisional order under their hands and seal of office accordingly, with such provisions, regulations, conditions, and restrictions, with respect to the application and execution of this act, or any part thereof, and with respect to any such local act, and the repeal, alteration, extension, or future execution of the same, and in all respects whatsoever as they may think necessary under all the circumstances of the case," &c.

(2) 11 & 12 Vict. c. 63, s. 88:—"The said special and general district rates shall be made and levied upon the occupier (except in the cases hereinafter provided) of all such kinds of property as by the laws in force for the time being are now or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property ascertained by the rate (if any) for the relief of the poor made next before the making of the respective assessments under this act. . . . Provided also, that the occupier of any land used as arable, meadow,

as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway, constructed under the powers of any act of parliament for public conveyance, shall be assessed in respect of the same in proportion of one fourth part only of such net annual value thereof," &c; and the order (s. 14) provided that "all houses, buildings, lands, and tenements, and hereditaments in North Shields, and all detached houses not in a street, and all lands used only as gardens or for the purpose of husbandry, should be rated at only two thirds of the net annual value."

The appellants' railway, &c., not being in North Shields, had been before the order rated at the full value; and they now appealed against their rating in two rates made by the respondents, as to so much of their lands as was used only as a railway, exclusive of stations, &c. (the rating in the township of Tynemouth being at the full value, and in Chirton at two thirds); and they contended that they could not legally be rated in respect of this in more than the proportion of one fourth of the annual value; the question for the Court being whether this contention was right.

June 3. *Manisty*, Q.C. (*Raymond* with him), for the respondents. *Kemplay* for the appellants.

The arguments and cases cited, sufficiently appear from the judgment of the Court.

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Blackburn and Lush, JJ.) was delivered by

LUSH, J. The rate appealed against is assessed upon the full annual value of such part of the appellants' railway as lies in the township of Tynemouth, and upon two thirds of the annual value

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or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway, constructed under the powers of any act of parliament for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof," &c.

This section is repealed by 21 & 22 Vict. c. 98, s. 55, but the last provision above set out is re-enacted.

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of that part which lies in the township of Chirton (including in each case the stations, dwelling-houses, warehouses, sheds, and the other adjuncts of a railway), and the appellants contend that they are entitled to the benefit of the proviso to the 88th sect. of the General Health Act (11 & 12 Vict. c. 63), and to have so much of their road as consists merely of the railway assessed in one fourth of the annual value, notwithstanding that the Provisional Order declares that such proviso shall not apply to the borough of Tynemouth. The contention is that that part of the order is ultrà vires. It is hardly necessary to say that if it is ultrà vires, it is not rendered valid by the 14 & 15 Vict. c. 103, inasmuch as that statute only confirms the provisional order so far as it is authorized by the Public Health Act.

Before proceeding to consider the terms of the Public Health Act, which confer the authority on the Board to make provisional orders, it is desirable to bring clearly to view the alterations which the provisional order proposes to effect.

By the 74th sect. of the Local Act (9 Geo. 4, c. xxxvii.), which as appears from the case, extended over the township of North Shields, and part of each of the townships of Tynemouth, Chirton, and Preston, the occupiers of lands, &c. in North Shields, of all detached houses, not in a street, and all gardens and lands used for husbandry throughout the district, were liable to be assessed to an annual rate in any sum not exceeding 1*s.* 4*d.* in the pound, and the occupiers of all property other than the above (except schools, &c.), in any sum not exceeding 2*s.* in the pound. There is nothing in the Act which required that the several properties should be rated in the proportions above indicated. It was only in the event of maximum rates being imposed that the property in North Shields, detached houses, gardens, &c., had any preference. Up to that point, each might have been assessed at its full annual value.

The appellants' railway, not being in North Shields, was, up to the passing of the 14 & 15 Vict. c. 103, rated at its full value.

The provisional order (s. 5) repeals the 74th sect. of the Local Act altogether, and this was clearly within the power of the Board (11 & 12 Vict. c. 63, s. 10: *Turner* v. *Mayor of Halifax*). (1) It

(1) Feb. 17, 1868, not reported; the written judgment of the Court has been mislaid.

also enlarges the area of the Local Act, and extended its unrepealed provisions over the whole municipal borough of Tynemouth; and this also was within the competence of the Board. This is the extent to which it "repeals, alters, and extends" the Local Act, so far as concerns the question before us. And if it had then done no more than "apply" the 88th sect. of the General Act, the consequence would have been that the stations, dwelling-house, &c., would have been separately rateable at their full annual value, but the line of railway with the sidings, turn-tables, and so much of the platform as was to be considered as the side of the railway would have been rateable at only one fourth of such value: *South Wales Railway Company* v. *Swansea Local Board of Health.* (1) But the order, while it "applies" s. 88 to the borough, excepts so much of that section as thus favours railways and canal property, and by sect. 14, orders that "all houses, buildings, yards, gardens, lands, tenements, and hereditaments in the township of North Shields, and all detached houses not forming part of a street, and all lands occupied solely as gardens or for the purpose of husbandry, shall be rated and assessed only upon two thirds of the full net annual value, and re-enacts the exemption of charity and other lands which were exempted by the Local Act, thus subjecting those parts of the line of railway which are not in the township of North Shields to a rating at full value, contrary to the terms of the 88th sect. of the General Act.

The authority of the Board of Health is given by the 10th sect. of the 11 & 12 Vict. c. 63, and it is in these terms: "If after such inquiry it shall appear to the said General Board that this Act *or any part thereof* should be 'put in force' within any city, town, borough, or place in which any Local Act is in force, they shall make a provisional order accordingly, with such provisions, regulations, conditions, and restrictions with respect to the application and execution of this Act or any part thereof, and with respect to such Local Act and the repeal, alteration, extension, or future execution of the same, and in all respects whatsoever, as they may think necessary under all the circumstances of the case." Is such a severing of the 88th sect. justified as a "putting in force," or to use the term which is employed in the earlier part of the section,

(1) 4 E & B. 189; 24 L. J. (M.C.) 30.

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as denoting the same thing, as "applying" a part of the act to this borough? We think not. The 88th section fixes the proportion in which certain descriptions of property shall contribute towards the expenses of the sanitary measures contemplated by the Act, and it must be supposed, according to the amount of benefit to be derived from these measures, and although the stipulation in favour of railways, canals, &c., is put in the form of a proviso, it is in substance an exception. The section says in effect, "the occupiers of all property, except canals, railways, arable, meadow, and pasture ground, &c. &c., shall be rated at full value, and the excepted properties at one fourth of such value."

To say that the excepted properties shall be rated at full value or at two thirds their value, is not to "apply" or "put in force" the Act or any part of the Act, but to make a new and substantially different enactment, materially altering the rights of parties in the district to which the Act is applied. It appears to us that the Board have no more power to make this alteration in the Act than they have to order that rates, which the Act says shall be paid by the occupier, shall not be paid by the occupier but by the owner. Is it then warranted by the general words which follow? What these words were intended to include is not clear. As observed by Coleridge, J., in *Clayton* v. *Fenwick* (1), "they are so general that they must receive some limitation." Whatever they may have been intended to mean, it seems obvious they did not mean to give such a power as this, for, while the word "alteration" is inserted with reference to dealing with the Local Act, no such word is found with reference to the General Act.

It was contended in the argument that the order, construed as a whole, amounted to no more in effect than the perpetuating the 74th section of the Local Act, and preserving the rights given by that section. We cannot accede to this view. If the 74th section remained in force, no more than 2*s.* in the pound could have been assessed in one year on so much of the railway as lies within the area of that Act, and for aught we know, the rates under the order may exceed this amount. Upon the different effect of the two sections, the 74th of the Act and the 14th of the Order, we have already observed. But even this argument applies only to North

(1) 6 E. & B. at p. 131; 25 L. J. (Q.B.) at p. 234.

Shields. The substantial objection remains that the properties beyond that limit which by the General Act are assessable at one fourth, are by the Order rateable at full value.

For these reasons, we are of opinion that the rates are bad and must be amended. (1)

Judgment accordingly.

Attorneys for appellants: *Williamson, Hill, & Co., for Richardson, Gutch, Richardson, & Cowling, York.*

Attorneys for respondents: *Young, Maples, & Co., for Lietch, Kewney, & Dodd, North Shields.*

BAMFORD AND ANOTHER *v.* CLEWES AND ANOTHER. *June 10.*

Pleading—Plea of Composition Deed, and Refusal of Plaintiff to accept Composition, without payment into Court.

To a declaration for goods sold and delivered, the defendants pleaded a deed of composition under the Bankruptcy Act, 1861, by which the defendants agreed to pay 10*s.* in the pound on all their debts, payable by instalments of 2*s.* 6*d.* at certain dates, and the creditors agreed to accept the composition in full satisfaction of their respective debts, and on payment of it to execute a release, and not to molest or sue the defendant for any claim, unless default should be made by the defendants in payment of the instalments; and it was agreed that if any creditor should sue contrary to this clause, the deed might be pleaded in bar of the action. The plea then alleged that the defendants were ready to pay the first instalment, but the plaintiffs refused to accept the same, and exonerated the defendants from paying or tendering it, and wholly refused to consent to or approve of, or become parties to, the deed. On demurrer:—

Held, that the plea was good without payment into court.

DECLARATION for goods bargained and sold, and for goods sold and delivered, and on an account stated.

Plea, on equitable grounds, that the defendants being indebted to the plaintiffs, as in the declaration alleged, and to others, a deed was made on the 14th of February, 1867, between the defendants of the first part, a surety of the second part, and the creditors of the defendants of the third part, reciting that the defendants being unable to pay their creditors in full had proposed to their creditors to pay a composition of 10*s.* in the pound, by four instalments of

(1) This was by agreement of the parties.

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2s. 6d. each at one month, five months, nine months, and thirteen months after the date of the deed, in full satisfaction and discharge of the several and respective claims and demands on them, the last of such instalments to be secured as thereinafter mentioned; and in consideration of the promises the several creditors of the defendants, being a majority in number representing three fourths in value of the creditors whose debts respectively amount to 10*l.* and upwards, have agreed to accept and take such composition in satisfaction and discharge as aforesaid, and in consideration and on payment thereof, or whenever thereafter called upon for the purpose, do hereby severally undertake and agree to execute to the defendants a release of their several claims. And do further agree not to sue or molest the defendants for any claim that they may have against them, unless or until default be made by the defendants in the payment of the said composition instalments at the times and in the manner aforesaid. And it is further agreed, that if any creditor shall sue or molest the defendants or either of them contrary to the last-mentioned agreements, these presents may be pleaded in bar of the said action," &c. The plea then alleged the necessary assents, &c., and that other requisitions under the Bankruptcy Act, 1861, had been observed, so as to make the deed binding on all the creditors: and that "the defendants were ready and willing to pay to the plaintiffs the said first instalment of the composition of 10*s.* in the pound, according to the terms and effect of the deed, but the plaintiffs refused to accept the same, and exonerated and discharged the defendants from paying or tendering it, and wholly and absolutely refused to consent to or approve of or become parties to the said deed."

The plaintiffs took issue on the plea; and demurred.

At the trial before Lush, J., at the sittings in London after Trinity Term, 1867, the deed was put in and the requisite conditions precedent proved, and it was shewn that the plaintiffs had all along refused to give their assent to the deed, and four days before the first instalment was due, one of the plaintiffs, at an interview with the defendants' solicitor about the deed and instalment, had said, "I won't take it; I never have accepted a composition or had anything to do with these deeds. I will get 20*s.* if I can."

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The jury found for the defendants, leave being reserved to move to enter the verdict for the plaintiffs, if the Court should be of opinion that there was not sufficient evidence to be left to the jury of tender of the first instalment, or of any dispensation on the part of the plaintiffs.

A rule having been obtained accordingly, and also for a new trial on the ground that the verdict was against the weight of evidence, the demurrer was argued with the rule.

J. S. Day shewed cause against the rule, and supported the plea. The plea is good; it is simply a discharge from the debt by the deed, with an allegation excusing the tender of the instalment, on the ground that the plaintiffs dispensed with it. And this is borne out by the evidence; at all events there was sufficient evidence to go to the jury on the question, and it was especially a case for them. *Ex parte Sullivan* (1), before the Lords Justices, is a distinct authority that the refusal to accept the first instalment dispensed with the necessity of tendering the second.

Griffits, in support of the rule and of the demurrer. The plea is bad; it amounts to a plea of tender, and there is no payment into court.

[COCKBURN, C.J. It is not a plea of tender; but the question is, whether the position the debtors take under the deed is displaced by their not having tendered the instalments.

LUSH, J. This is not a plea of tender of the debt, which admits the debt sued for, but it is a plea amounting to a statement that the debt is done away with by the deed, until default, and that there has been no default.]

An allegation of the defendants' continued readiness and willingness to pay should have been added. Secondly, the evidence does not amount to an exoneration by the plaintiffs of the defendants from tendering the instalments.

Day, in reply. The defendants are protected by the deed until default, and the plea shews there was no default, because the plaintiffs dispensed with the tender; it is clearly, therefore, at least, a good equitable plea.

COCKBURN, C.J. I am of opinion that, on the particular terms

(1) 15 L. T. (N.S.) 434.

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of this deed, we may decide in favour of the defendants without infringing any rule of law. The condition of this deed is, that the defendants shall not be liable to be sued by any creditor until they make default in the stipulations which they have to perform. Assume that the defendants did tender or make an offer equivalent to a tender, and the creditor refused to take the instalment, there would in that case have been no default. But here, in order to show a default, it must be shown that the plaintiffs were minded to take the money, and that the defendants refused, or did not tender it, contrary to the stipulations in the deed. Unless that were shewn, there would be no default so as to disentitle the defendants from using the deed as a bar to the action. With regard to the evidence, it was a question entirely for the jury; the judge who tried the case is not dissatisfied with the verdict, and we therefore cannot say there ought to be a new trial.

LUSH, J. The plaintiffs, or one of them, appears from the very first to have said, I will not consent to the terms of the deed, or accept any instalment when the time comes; and afterwards, when the time had come, he seems to have made no change in his views. He meant to say, you need not come and offer me the instalment, I won't take it. The jury came to this conclusion; and I cannot say they were wrong. As to the form of the plea: the action is for the original debt, and the defendants seek to answer the plaintiffs' claim, not by admitting the debt and pleading a tender or excuse for it, but they set up the deed as an exoneration from the debt on certain conditions, and they go on to shew that they did not make any default. The plea is therefore good.

HANNEN, J., concurred.

Rule discharged, and judgment for the defendants.

Attorneys for plaintiffs: *Underhill & Field.*

Attorneys for defendants: *Brodrick & Gray, for Manby, Wolverhampton.*

JONES *v.* THE FESTINIOG RAILWAY COMPANY.

1863
June 26.

Railway Company, Liability of, without Negligence, at Common Law, for Damage done by Fire from Locomotive Steam Engines.

A company were empowered by act of parliament, passed in 1832, to make and maintain, and to do all matters fit or necessary for making and using a railway or tramroad for the passage of waggons, engines, and other carriages, for the purpose of conveying minerals, &c. The company having obtained the certificate of the Board of Trade, ran passenger trains drawn by locomotive steam engines, having taken all reasonable precautions to prevent the emission of sparks. The plaintiff's hay stack having been fired by sparks from one of the engines:—

Held, that as the company had not express powers given them by statute to use locomotive steam engines, they were liable at common law for the damage, though negligence was negatived.

CASE stated on appeal from the County Court of Carnarvonshire, holden at Portmadoc.

This was an action to recover 42*l.* for damage which the plaintiff alleged had been sustained by the acts of the defendants.

The defendants are a railway company incorporated by an act of parliament passed in 1832 (2 Wm. 4, c. xlviii.) The plaintiff is the occupier of a tenement adjoining the company's line. In the month of August, 1867, one of the defendants' trains, carrying passengers, in accordance with a certificate of the Board of Trade, and drawn by a steam locomotive engine, was proceeding along the line past the plaintiff's premises. In passing, sparks from the engine were emitted and blown towards a hay stack belonging to the plaintiff, which immediately took fire, and, together with the building in which it was stacked, was burnt down. It was proved by the defendants, that all reasonable precautions had been taken to prevent the emission of sparks.

It was contended by the defendants that their company being incorporated by act of parliament, and all reasonable and necessary precautions having been taken by them against the emission of sparks and fire from their engines, they were not liable for any injury done to adjacent property by reason of escape of sparks from their engines.

The plaintiff contended that the defendants were not empowered by the act incorporating the company (2 Wm. 4,

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c. xlviii.) (1), or by any other law, to use steam locomotive engines; and that, if they used them, they were liable at common law for any resulting injury to adjoining property.

The judge held that the defendants were authorized by law to use steam locomotive engines on their railway, and had adopted all reasonable precautions against the emission of fire and sparks; his judgment was, therefore, for the defendants.

The plaintiff thereupon gave notice of appeal, and in such notice the following grounds were stated:—That the defendants are not authorized by any act of parliament to use steam locomotives on their railway, and are therefore liable to me for the injury done by them to my property by reason of the use of such locomotives; and that it is no answer to the action that the company used proper precautions in the use of their locomotive on

(1) 2 Wm. 4, c. xlviii. (23 May, 1832), after reciting that "the making and maintaining a railway or tramroad, or railways or tramroads, for the passage of waggons, engines, and other carriages, commencing at . . . . . will greatly facilitate the conveyance of coals and other heavy articles to the several slate and other quarries and mines in the district, and the conveyance of slates, copper and other ores, to the seaside;" by s. 1 empowers certain persons to form a corporation to be called "The Festiniog Railway Company," for the purpose of carrying out the said undertaking. By s. 2, the company is empowered to make and maintain a railway or tramroad, to be called "the Festiniog Railway," passable for waggons and other carriages from &c. to &c. By s. 3, inter alia, the company is empowered to make, build, erect, bank, excavate, and set up in or upon the lands adjoining the railway . . . . such houses, warehouses, tollhouses, landing-places, weighing-beams, cranes, fire-engines, and other machines, ... as the company may think necessary . . . . and also to make, set out, and appoint such roads and ways, convenient for hauling or drawing waggons and other carriages passing upon the said railway or tramroad, with men, or horses, or otherwise, as the company may think convenient; . . . . and to construct, make, and do all other matters and things fit or necessary for the making, altering, preserving, improving, completing, and using the said railway or tramroad, wharfs, and other works to be made or constructed in pursuance of, and according to, the true intent and meaning of the act. By s. 5, the company, in erecting or setting up any engine or engines, commonly called steam engines, shall use the most approved method to consume and burn the smoke arising therefrom, so as to prevent the same occasioning any nuisance whatsoever; and if the company, or any person employed by them, shall set up or use any steam engine without burning or consuming the smoke upon the principle aforesaid, they shall forfeit for every such neglect or default 50*l*., to be recovered in an action of debt or on the case, and such steam engine may be abated as a nuisance.

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the line, and that there was evidence of the defendants' liability for the damage done to me.

The question for the Court is, whether the defendants are authorized by law to use steam locomotive engines on their railway, so as to exempt them from liability for injuries done to adjoining property by reason of their using such engines, reasonable precautions being adopted by the company to guard against such injuries.

Morgan Lloyd, for the plaintiff. The defendants' Act was obtained in 1832, and was merely for the making of a tramway to carry minerals. There is nothing in it which can be said, even by implication, to authorize the use of locomotive engines; and the certificate of the Board of Trade is of course nugatory as to legalizing their use. The case, therefore, is not within *Vaughan* v. *Taff Vale Railway Company* (1); and the fact of there being no negligence is immaterial; at common law a person using a thing of a dangerous nature must use it at his peril if another is damaged by the use: *Fletcher* v. *Rylands*. (2) The Court of Exchequer Chamber, in *Vaughan* v. *Taff Vale Railway Company*, adopted the decision in *Rex* v. *Pease* (3); but it was assumed by the Court in both cases that, but for the express statutory sanction of the use of locomotive engines the defendants would have been liable for the mere use, without any negligence beyond the use. *Tubervil* v. *Stamp* (4) is also expressly in point, that a man is liable for the damage done by a fire kindled on his own premises, unless a storm had caused the fire to be blown from his premises.

Huddleston, Q.C. (*G. Bruce* with him), for the defendants. The case comes within the exception in *Tubervil* v. *Stamp* (4), for the sparks were driven by the wind to the plaintiff's stack.

[BLACKBURN, J. There is no statement of anything beyond the ordinary wind; it is only a sudden, unexpected storm which is meant by the exception in that case.]

All negligence is negatived; and the statute, by its preamble, shews that the *passage* of engines is contemplated.

[BLACKBURN, J. In s. 3 the railway is to be made passable for

(1) 5 H. & N. 679; 29 L. J. (Ex.) 247. affirmed in the House of Lords, Law Rep. 3 H. L. 330.

(2) Law Rep. 1 Ex. 265, 279; (3) 4 B. & Ad. 30.

(4) 1 Salk. 13.

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waggons and other carriages: engines can scarcely have meant steam engines. Section 5 seems to contemplate only stationary engines by the language used.]

The "passage" of engines cannot apply to stationary engines, even if s. 5 be confined to them. At the very lowest, the statute, by authorizing the making of the railway, and the "doing of all matters necessary for using the railway," has sanctioned and legalized the use of all appliances which, from time to time, may be introduced by science. It is to be observed also that locomotive steam engines were known and in use long before the year 1832. (1)

BLACKBURN, J. I am of opinion that the plaintiff is right, and that the company, under the circumstances, were liable to make good the damage caused by the sparks from their engine. The general rule of common law is correctly given in *Fletcher* v. *Rylands* (2), that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril; and is liable for the consequences if it escapes and does injury to his neighbour. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shewn on their part. The exception to this liability was first made in *Rex* v. *Pease* (3), and *Vaughan* v. *Taff Vale Railway Company* (4), in the Exchequer Chamber, established the propriety of that decision. In *Rex* v. *Pease* (3), the defendants were authorized by act of parliament to make a railway according to certain plans, and at one part it ran parallel and near to a highroad; by a second Act they were authorized to use locomotive engines, and the Court held that the "unqualified authority of the legislature"

(1) In *Rex* v. *Pease* (4 B. & Ad. at p. 33) the company were authorized by a statute passed in 1823 (4 Geo. 4, c. xxxiii.), s. 8, "to make and *erect* such and so many locomotive or moveable engines as they shall think proper, and to use and employ the same in and upon the said railways or tramways, for the purpose of facilitating the transport of goods, &c., and also of passengers."

(2) Law Rep. 1 Ex. 265, 279; affirmed in the House of Lords, Law Rep. 3 H. L. 330.

(3) 4 B. & Ad. 30.

(4) 5 H. & N. 679; 29 L. J. (Ex.) 247.

legalized what would otherwise have been a nuisance, and saved the defendants harmless from an indictment. In *Vaughan* v. *Taff Vale Railway Company* (1), this principle was adopted and applied to a civil action. The company were expressly authorized by s. 86 of the Railway Clauses Consolidation Act (8 Vict. c. 20), to employ locomotive engines as a motive power for their carriages and therefore to use and carry the fire along the railway, and the decision of the Exchequer Chamber was, that this express authority of the legislature took the case out of the operation of the common law, and legalized the use of the dangerous engines, subject to the condition that the company took all reasonable precautions, and if, in spite of these precautions sparks escaped, the company were not liable for the consequences. Cockburn, C.J., after pointing out that the judgment of the court below was inconsistent with the principle of *Rex* v. *Pease* (2), which the Court of Exchequer Chamber proposed to uphold, says (3): "Although it may be true, that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument, yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if the damage results from the use of the thing, independently of negligence, the party using it is not responsible." The other judges said nearly the same thing, the ground of their decision being that the legislature had expressly authorized the use of locomotive engines. In order to bring the present defendants within the decision, it is essential to shew that their Act authorized the use of locomotive engines, and it is not enough to shew that it authorized the making and using of a railway and that there are no words either prohibiting the use of locomotives, or shewing that the legislature meant to prohibit the use. Now, in the present Act there is nothing amounting to an express authority. The preamble recites the facility that will accrue for the carriage of heavy goods, by the

(1) 5 H. & N. 679; 29 L.J. (Ex.) 247.
(2) 4 B. & Ad. 30.
(3) 5 H. & N. at p. 685; 29 L. J. (Ex.) at p. 247.

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making of a railway for the passage of waggons, *engines*, and other carriages; that may possibly refer to locomotive steam engines, or to moveable machines such as cranes, &c. By s. 3 the company are authorized to make roads or ways convenient for hauling or drawing of waggons and other carriages passing upon the railway with men or horses, or *otherwise;* the latter word may refer to locomotive steam engines, but most probably it refers to fixed engines, which are the only engines mentioned in s. 5; there is also a general clause in s. 3, authorizing the company to do all other things necessary for the using of the railway. No other clause in the statute was pointed out having any bearing on the use of locomotives, and these clauses referred to clearly cannot be said expressly to authorize the use of locomotive engines. At the most the statute authorizes the making of a railway, and the drawing of carriages along it by some means or other, and does not prohibit the use of locomotive engines for this purpose; but there is nothing to authorize the use, so as to relieve the company from their liability to the consequences at common law of using them. It follows, from the view I take, that the judge's decision must be overruled; but the utmost that can be said is, that in my opinion he has made a mistake, but upon a nice point, on which others may differ from me.

LUSH, J. The point is certainly a nice one. But I entirely concur with what my Brother Blackburn has said. I can see nothing in this statute to licence the company to use locomotive engines. In the absence of this licence the company are left to their liabilities at common law: that is, if they use a highly dangerous machine, they must do so at the peril of the consequences if it cause injury to others. The case of *Fletcher* v. *Rylands* (1), and the authorities referred to in Com. Dig. tit. Action, upon the case for negligence (A. 6), illustrate this principle.

Judgment for the plaintiff for a new trial.

Attorney for plaintiff: *Chas. Wilkin.*
Attorneys for defendants: *Symes, Sandilands, & Humphry.*

(1) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330. 12 Jur. N.S. 603.

WILLIAMS *v.* EARLE.

1868
June 27.

Landlord and Tenant—Covenants running with Land—Covenant not to assign without Licence—Covenant to repair and renew Tenant's Fixtures—Damages, Measure of.

A covenant, in an indenture of lease, by which the lessees, for themselves, their heirs, executors, administrators, and assigns, covenanted that they, their executors, administrators, and assigns, would not assign, underlet, or otherwise part with the possession of the demised premises without first obtaining the consent in writing of the lessor, is a covenant which touches and concerns the land, and therefore runs with the land, and the lessor can sue an assignee of the lessee for the breach of it.

The measure of damages in an action for a breach of the covenant is such a sum as will, as far as money can, put the plaintiff in the same position as if he had still the defendant's liability, instead of the liability of another of inferior pecuniary ability, for breaches both past and future.

Similar covenants to keep in repair the buildings, and to repair, renew, and replace tenant's fixtures and machinery fixed to the premises, run with the land, and bind the assignee; but not similar covenants as to mere utensils or moveable chattels used in the business carried on in the demised premises and being there at the time of the demise.

First count, on an indenture of lease of the 21st of February, 1859, whereby the plaintiff let and demised to Harriett Carmont, William Carmont, and William Cubitt, unto them, their executors, administrators, and limited assigns, certain land, together with the erections and buildings thereon, known as the Clayton Forge, and all the engines, boilers, mill gearing, millwright work, hammers, cranes, tools, plant, fixtures, machinery, utensils, apparatus, and effects in and about the said premises, with the appurtenances, and specified in the schedule thereunder written, together with the appurtenances, to hold unto the said lessees, their executors, administrators, and limited assigns, from the 25th of March then next, for the term of fourteen years, determinable as therein mentioned, at the clear yearly rent of 330*l.*, by equal quarterly payments on the usual quarter days, and the first payment of the said rent to become due on the 25th of March then next, the rent being always due and payable in advance (if required by plaintiff or by one James Kirkman) on the first day of each current quarter during the said term until the 25th of December next preceding the expiration of the term, it being provided by the said deed that

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the rent should be paid to the plaintiff or Kirkman in the manner therein provided.

And the said lessees did thereby, for themselves, their heirs, executors, administrators, and assigns as aforesaid, covenant with the plaintiff that they, the said lessees, their executors, administrators, and assigns would yearly and every year during the said term pay the said rent as aforesaid upon the days and in the manner appointed. And further, that they, the said lessees, their heirs, executors, administrators, and assigns, would from time to time, and at all times during the continuance of the said demise, well and sufficiently maintain and keep the forge, furnaces, and other buildings, walls, and fences thereby demised, both inside and outside, and all erections and buildings and improvements (if any) which should during the continuance of that demise be erected on the said plot of land thereby demised, and all additions and improvements thereto respectively (except main walls and principal timbers) in good and tenantable order, repair, and condition, and also would at all times during the continuance of that demise well and sufficiently maintain and keep the fixtures, steam engine, boilers, shafting, gearing, pipes, furnaces, cranes, plant, tools, utensils, and other articles and things expressed to be thereby demised, and also which might at any time or times during the continuance of that demise be brought or set up upon or in the said land, buildings, and premises, or any of them, and all additions and improvements thereto respectively in good and complete working order, repair, and condition; and also would from time to time replace and make good all such fixtures, engines, boilers, shafting, gearing, pipes, hammers, cranes, machinery, tools, plant, utensils, and other articles, matters, and things as should from time to time be broken or worn out, immediately after the same should be so broken or worn out. And moreover, that they, the said lessees, their heirs, executors, administrators, and assigns, or any of them, would not, without the previous written consent of the plaintiff or Kirkman, pull down or remove, or permit to be pulled down or removed, all or any of the fixtures, doors, walls, windows, or floors of, or belonging to, the said demised premises, or any building or buildings to be thereafter erected on the said plot of land thereby demised, nor the said then present or any future

engine, boilers, shafting, gearing, fixed or moveable machinery, plant, hammers, cranes, tools, or utensils then at or upon the said demised premises, nor do or commit or permit any other wilful or voluntary waste, spoil, or destruction in or upon the said demised premises or any part thereof.

That afterwards, and after the 13th of August, 1859, and during the said term, all the estate of the lessees in the said land and premises duly and by such consent as was by the deed provided vested in the defendant by assignment, subject to the conditions, restrictions, stipulations, covenants, and agreements of the said lease; and after the assignment, and while the premises were vested in the defendant, and during the said term, two quarters rent became due, but not as rent in advance. The count then alleged that all conditions precedent, &c., to enable the plaintiff to sue had happened, and alleged breaches by the defendant: 1, non-payment of rent; 2, non-repair of the buildings in the terms of the covenant; 3, non-repair of the fixtures, &c., in the terms of the covenant; 4, not replacing and making good all the fixtures, &c., broken and worn out; 5, pulling down certain fixtures, doors, &c., without the previous written consent of the plaintiff or Kirkman; 6, the committing and permitting wilful and voluntary waste.

Second count, that the lessees, by the said deed, for themselves, their heirs, executors, administrators, and assigns, further covenanted that they, the lessees, their executors, administrators, or assigns would not, nor would any of them, assign over, underlease, or underlet, or otherwise part with the possession of the said demised premises, or any part thereof, or of the said lease, without first obtaining the consent in writing of the plaintiff or of the said James Kirkman, and then only for such time, and in such manner, and under and subject to such restrictions as should be expressed in such consent. That the estate became vested in the defendant at the time and in the manner alleged in the first count; and that while it was so vested in the defendant, and during the term, the defendant did assign and part with the possession of the said demised premises without first or at any time obtaining the consent in writing of the said Kirkman or the plaintiff, whereby the premises were by the defendant assigned and came into the possession of a person unable to pay the rent, and the plaintiff has been

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unable, and still will be unable, to obtain the rent, and the land and premises will be and are of much less value to the plaintiff than they otherwise would have been, and the lease had become and is of no use or value to him, he having no responsible or solvent person to look to to obtain, or from whom to recover, payment of past and future rent, and the observance and performance of the covenants in the lease on the part of the lessees, their executors, administrators, and assigns.

Pleas to the first count: 1. That the deed was not the deed of the lessees. 2. That the estate of the lessees did not vest in the defendant by assignment, as alleged. 3. To breach for non-payment of rent, that no part of the rent became due as alleged. 4. Payment of the rent. 5. Denial of all the breaches. 6. That defendant, before any of the breaches, assigned all his interest in the lease.

To the second count: 7. That the estate of the lessees did not vest in the defendant, as alleged. 8. Traverse of the breach.

There was also a demurrer on the ground that the covenant of the lessees not to assign without licence did not bind the defendant as assignee.

The plaintiff replied, joining and taking issue on the several pleas, and joined in demurrer.

The cause came on to be tried before Mellor, J., at the Manchester spring assizes, 1867, when, by consent, a verdict was found for the plaintiff for the damages claimed, subject to the opinion of the Court upon a special case to be stated, and the amount of the damages, if necessary, to be ascertained by an arbitrator, on the principle directed by the Court.

The following are the facts of the case material for the points reported:—

1—3. The plaintiff is the mortgagee and lessor, and James Kirkman the mortgagor, of the Clayton Ironworks, which are the premises referred to in the lease set out in the declaration; and the plaintiff, as such mortgagee, demised, and the mortgagor confirmed, the same, and the lessees' covenants in the lease are made to and with the plaintiff, and also separately with the mortgagor. The said premises were assigned to the defendant on the 25th of

July, 1860, under a licence signed by the plaintiff and Kirkman, in pursuance of such lease, and subject to all the covenants, &c., in it.

4. The defendant took possession of the premises under the assignment, which was by indenture between the lessees and the defendant, and subject to the covenants of the lease, and was executed by the lessees, but the defendant did not execute it.

5 and 6. The mortgage between the plaintiff and Kirkman was dated the 19th of July, 1858, and the amount of the mortgage money on the premises due from the mortgagor to the plaintiff was 1000*l.*, 100*l.* of which has been paid off, the premises being worth, after the removal of the machinery, fixtures, and moveable effects, upwards of 3000*l.* at the least.

7. The mortgagor was suffered by the plaintiff to remain in receipt of the rent of the premises, and the plaintiff never interfered in the management or dealing with the property or disposal of the premises, except by executing the said licence; and the plaintiff was requested by the mortgagor to allow this action to be brought, and the same is brought in his name in consequence of such request.

8 and 9. At the date of the lease the Clayton works were constructed as a forge for forging iron, but afterwards, with the consent of the mortgagor, the lessees, by way of improvement, adapted the premises to the purposes of rolling iron, and set up, at a great expense, rolling mills, machinery, fixtures, and moveable effects upon the premises, and made alterations, and additions, and improvements therein for the purpose of rolling iron; and they were assisted by very large pecuniary advances made to them by the defendant, and they continued in the occupation of the premises for about a year and a half after the making of the lease.

10. Some of the said improvements, machinery, fixtures, and moveable effects set up by the said lessees were set up by them in lieu of, and in substitution for, machinery, fixtures, and effects demised by the lease which had been worn out, or which had bee removed by the lessees for the purpose of making such alterations, additions, and improvements.

11. After the said advances by the defendant, it was found, on an investigation of the affairs of the lessees, to be necessary fo

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them to compound with their creditors, and to give up their works and the lease. Upon such investigation the assets of the lessees shewed 6*s.* in the pound, and the defendant paid the other creditors of the said lessees 10*s.* in the pound, and took to the premises in consideration of such payment.

12. James Kirkman was desirous that the defendant should become assignee of the lease, and the plaintiff and Kirkman signed the licence, and on the same day the lessees executed to the defendant the said assignment.

13. After the defendant became assignee he continued to carry on the business, and at a very great expense set up other rolling mills, machinery, fixtures, and moveable effects upon the said premises, and made great alterations, additions, and improvements therein.

14. Some of the said rolling mills, machinery, fixtures, and moveable effects set up by the defendant were set up in lieu of, and substitution for, machinery, fixtures, and effects demised by the lease, or set up by the lessees, or which had been worn out, or which had been removed by the defendant for the purpose of making such alterations, additions, and improvements.

15. The defendant at or about Christmas, 1865, found it necessary to, and did, discontinue the said business.

16. After such discontinuance of business by the defendant, he offered to the mortgagor to surrender the premises, together with the improvements, machinery, fixtures, and moveable effects which were then on the demised premises to be taken at a valuation, which offer was declined by the mortgagor.

17. The defendant afterwards, on the 27th of September, 1866, without the licence or consent of the mortgagee or mortgagor, and with a view of getting rid of further liability as assignee, assigned the lease and premises to James Banks, the editor of the *Cricketers' News*.

18. The defendant, whilst he was such assignee, and before and after he discontinued the business, and before and after he assigned the said premises to Banks, took down and removed from the premises machinery, fixtures, and moveable effects which were thereon at the time of the making of the said lease.

19. The defendant, whilst he was such assignee, and before and

after he discontinued the said business, and before and after he assigned the said premises to Banks, also took down and removed from the premises improvements, machinery, fixtures, and moveable effects, which had been set up thereon by the lessees.

20. The defendant, whilst he was such assignee, and before and after he discontinued the said business, and before and after he assigned the said premises to Banks, also took down and removed from the premises improvements, machinery, fixtures, and moveable effects which had been set up thereon by himself.

21. Some of the improvements, fixtures, and moveable effects so removed by the defendant, both before and after the assignment by him, were improvements, machinery, fixtures, and effects which had been put up by the lessees and by him, or were improvements, machinery, fixtures, and effects set up by the lessees and the defendant in lieu of, and in substitution for, machinery, fixtures, and effects which were upon the said premises at the time of the said lease.

22. The defendant has not replaced all such last mentioned machinery, fixtures, and effects, so as to restore the premises to the same state and condition as the same were in at the time of making the lease.

23. All the rent due up to the date of the assignment by the defendant was paid before the commencement of this action, but none has been paid since such assignment by the defendant or any other person.

24. The defendant has committed a breach of the covenant to maintain and keep in order, repair, and condition, and to replace and make good, and of the covenant not to pull down or remove, or to permit to pull down and remove, and of the covenant not to do, commit, or permit waste, spoil, or destruction.

The questions for the opinion of the Court were: 1. Whether the plaintiff is entitled to recover on any of the breaches in the declaration. 2. If the Court be of opinion that the plaintiff is entitled to recover upon any of the breaches, upon what principle, and in respect of what breaches are damages to be assessed.

Holker, for the plaintiff. There are breaches of several covenants alleged in the declaration, and proved to have taken place; such

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as non-repair, not replacing machinery worn out, and removing machinery; but the main question is that which is raised by the demurrer to the second count, whether a covenant not to assign runs with the land. And, first, it may be as well to observe that this breach of covenant is alleged and proved to have taken place after the 13th of August, 1859, and therefore after the passing of 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38. Secondly: The covenant runs with the land, and binds the assignee; assigns are expressly mentioned in this and the other covenants, so that the case is within the second resolution in *Spencer's Case* (1), if not within the first; for the thing covenanted to be done, or rather not to be done, touches and concerns the thing demised, relating as it does to the occupation of the premises.

[LUSH, J. Although assigns are expressly named, the covenant will not run with the land, and so bind the assignee, unless, in the language of Lord Ellenborough, C.J., in *Mayor of Congleton* v. *Pattison* (2), it be a covenant "directly affecting the nature, quality, or value of the thing demised, or the mode of occupying it;" and the other judges give substantially the same definition of a covenant which runs with the land.]

Nothing can affect the mode of occupying the land more than a clause as to the person who is to be allowed to occupy it. In *Paul* v. *Nurse* (3) an assignee was sued for rent, to which he pleaded that he had assigned the estate before the rent became due, and it was attempted in the replication to answer that by alleging that the assignment was without licence, and that the lessee covenanted in the deed that he and his assigns would not assign without licence, the Court held that the defendant was not estopped by the covenant from setting up the assignment, and that as the estate passed, the privity of estate was destroyed, and the defendant's liability had ceased. But Bayley, J., adds what is very much to the point here: "The plaintiff's remedy is by an action on the covenant not to assign." *Hooper* v. *Clark* (4) is also in point.

As to the other breaches of covenant, par. 24 expressly finds

(1) 5 Rep. 16a; 1 Sm. L. C. 6th ed. 45.
(2) 10 East, at p. 136.
(3) 8 B. & C. 486, 489.
(4) Law Rep. 2 Q. B. 200.

that the defendant has been guilty of several of them, and they clearly touch the land. [He was then stopped by the Court.]

T. Jones, Q.C. (with him *Herschell*) for the defendant. The covenant not to assign does not run with the land. The dictum of Bayley, J., in *Paul* v. *Nurse* (1), does not mean that an action might be brought on the covenant not to assign against the assignee, but against the original lessee. This is shewn by what is added: "Besides, it may admit of some doubt whether the defendant (the assignee) is within the covenant, for the lessee only covenants that he, his executors and administrators, will not assign." None of the cases cited are in point, for the covenants in each of them directly affected the land as to the mode of using it, &c.

[BLACKBURN, J. That can scarcely be said in the case of a covenant to renew a lease.

LUSH, J. Is there not a case in point under the Bankruptcy Acts?]

Yes: *Doe* d. *Cheere* v. *Smith* (2), where the original lessee having become bankrupt, his assignees took to the lease, and it afterwards came again to the lessee by mesne assignments, and it was held that the bankrupt was discharged from his covenants as lessee by the Bankrupt Act (49 Geo. 3, c. 121, s. 19), and that as assignee he was not bound by a covenant not to assign.

[BLACKBURN, J. The covenant there did not mention assigns.]

In *Lucas* v. *How* (3) the majority of the Court seemed to have been of opinion that a condition not to assign was collateral, and did not bind the assignee, but no judgment appears to have been given. *Pennant's Case* (4) is cited in the margin, in which a covenant not to assign is treated as collateral.

[BLACKBURN, J. "Collateral," in the sense that a breach of it would not necessarily be known to the landlord.]

In *Collins* v. *Sillye* (5) the lessee covenanted not to assign the premises or any part; the lessor entered upon part, and the lessee then assigned the rest; and it was held that the covenant was collateral, and therefore an action would lie for the breach, though committed after the entry of the lessor.

[LUSH, J. In *Tatem* v. *Chaplin* (6) a covenant by the lessee, his

(1) 8 B & C. at p. 489.
(2) 5 Taunt. 795.
(3) Sir T. Raym. 250.
(4) 3 Rep. 64a.
(5) Sty. 265.
(6) 2 H. Bl. 133.

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executors and administrators, to reside on the premises was held to bind the assignee, though not named, as being annexed and appurtenant to the thing demised according to the first and sixth resolutions in *Spencer's Case.* (1) That is very much the same thing as the present covenant.]

The covenant affects neither "the nature, quality, or value of the thing demised," to use Lord Ellenborough's words in *Mayor of Congleton* v. *Pattison* (2), but is simply a collateral and personal covenant. It cannot be said to affect the *mode* of occupation. In *Bally* v. *Wells* (3) the Court draws this distinction between a covenant as to occupation and a covenant not to assign. They held that a covenant by the lessee of tithes not to let any of the farmers have any of the tithes bound the assignee. "What," say the Court, "is this covenant? It is as to the mode of occupation." And they liken it to covenants to spend all the muck on the land; and add: "A covenant not to assign generally must be personal and collateral, and can only bind the lessee himself; there never can be any assignee." The original lessee remains liable, although he or the assignee assigns over; but the assignee is only liable for breaches during the continuance of his estate. An assignment, therefore, by an assignee cannot be a breach for which he is liable, as it does not take place till the estate is transferred.

Secondly, as to the measure of damages, it is impossible to shew any damage from the breach of this covenant.

[BLACKBURN, J. The lessor has a right to be put in the same position, as far as money can do it, as if the covenant had not been broken.]

It is impossible to estimate in money the damage done by the assignment, non constat that the assignee Banks is not just as responsible a person as the defendant.

As to the other covenants, it is clear that the mere moveable chattels come within the third resolution in *Spencer's Case* (1), and the plaintiff cannot recover for them against the defendant in the present action, nor for the removal of tenant's fixtures: *Sumner* v. *Bromilow.* (4)

(1) 5 Rep. 16a; 1 Sm. L. C. 6th ed. 45.
(2) 10 East, at p. 136.
(3) 3 Wils. 25, 32, 33; see also Judgments of Wilmot, C.J., 341.
(4) 34 L. J. (Q.B.) 130.

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[BLACKBURN, J. Tenant's fixtures, though fixed to the freehold, are removeable at the end of the term; and if fixed so as to be part of the land, a covenant relating to them during the term touches the land, and runs with the land.

LUSH, J. That is the true distinction between mere moveables and tenant's fixtures.]

BLACKBURN, J. This is an action by the lessor against the assignee of a lease for breach of covenants in the lease, and the rule has been well established ever since *Spencer's Case* (1), that, when covenants are contained in a lease (at all events if, as in the present case, the covenants are on behalf of the lessee and his assigns), and the covenants touch or concern the land, although the original covenants are made by the original lessee with the lessor, yet they run with the land, and there being privity of estate between the assignee and the lessor, the lessor may sue the assignee for breach of any of them. But this is only in the case of a covenant which "touches or concerns" the land.

Now the first and chief point to be determined here is, there being a covenant in the original lease by which the lessees, on behalf of themselves and their assigns, covenant with the lessor that neither they nor their assigns will assign the lease without the licence of the mortgagor and mortgagee, and the defendant the assignee having assigned without their licence, whether that is a covenant which touches or concerns the land, and therefore runs with it and binds the defendant.

I have been unable to perceive, after listening attentively to the argument of the counsel for the defendant, any reason why this covenant should not be considered a covenant touching and concerning the land. It is an express covenant as to who shall have and occupy the land, and it is inserted with a view that the landlord shall not be deprived of a voice as to who shall be substituted for the original lessee in the possession of the landlord's premises. It is certainly very material as touching the interest of the landlord and tenant, and touches and concerns the thing demised quite as directly as the many covenants that have been held to do so. Such as a covenant to renew a lease, which has been held to run with

(1) 5 Rep. 16 a; 1 Sm. L. C. 6th ed. 45.

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the land in more than one case cited in the judgment of the Court in *Roe* v. *Hayley* (1); or a covenant to reside in the demised premises, which was held in *Tatem* v. *Chaplin* (2) to bind the assignee though not named. Again, in *Bally* v. *Wells* (3) a covenant not to let any of the farmers take the tithes demised without the consent of the lessor was held to run with the tithes and bind the assignee, assigns being mentioned in the covenant. And the expression made use of by the Court at the end of the judgment, which Mr. Jones relied upon as shewing that a covenant to assign without a licence could not run with the land, seems to have no such meaning, but the contrary. The expression is, "a covenant not to assign generally must be personal and collateral, and can only bind the lessor himself, there never can be an assignee;" but the Court adds, "whereas the present lease grants to executors, administrators, and *assigns;*" and what they seem to have meant is, that when the lessee covenants, not that he will not assign without licence, but that he will not assign at all, then the covenant of course does not run with the land, because the covenant is gone whether the assignment be with a licence or without. But when there is a covenant that the lessee and his assigns will not assign without licence, it is different, and the covenant may run with the land toties quoties. It seems to me, therefore, both upon principle and authority, that the present covenant not to assign without licence from the landlord from time to time, does run with the land, and consequently the defendant, the assignee, is liable for the breach.

But though there is a covenant binding on the defendant not to assign, the assignment is nevertheless operative, and the estate passed from the defendant to Banks, and the breaches of covenant which have occurred since are not breaches for which the defendant can be liable in the present form of action; anything done by the defendant on the premises since then he may be liable for in an action on the case: but the remedy on the covenants must be against the new tenant Banks. But the plaintiff is entitled to recover indirectly in the present action by way of damages for the breach of the covenant not to assign. For inasmuch as, if the cove-

(1) 12 East, at p. 469. (2) 2 H. Bl. 133.
(3) 3 Wils. 25, 33.

nant not to assign had not been broken, the assignee would have remained liable to the plaintiff to fulfil all these covenants, the breaches of which are mentioned in the first count, and there would have been, if he remained solvent, a complete and sufficient remedy in his liability, the defendant having assigned over to a person, who no doubt is selected because he has nothing to lose and so loses nothing by incurring the liability under the covenants, there has been damage sustained by the plaintiff by the defendant's breach of covenant not to assign, by reason of the plaintiff only having the liability of this inferior person, instead of the liability of the defendant, for the breaches of the other covenants; and the arbitrator, in assessing the damages on the second count, must put the plaintiff, as far as possible, in the same position, so far as money will do it, as if the covenant had not been broken. The arbitrator will take into consideration how much the worse the plaintiff will be both in respect of breaches of covenant already incurred, as well as in respect of breaches which may in future be incurred. The arbitrator must see what sum of money will put the plaintiff in the same position as he would have been in if the covenant not to assign the lease had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability. I agree with Mr. Jones that this will be a matter of some difficulty, and the parties would do well to agree that the lease shall be surrendered to the plaintiff, and then the measure of damages will be by how much worse off the plaintiff is than he would have been had the defendant continued bound as lessee all the time, as he would have been had he not broken his covenant not to assign.

There are some further questions for our consideration, which will be material for the arbitrator's guidance in assessing the damages, both on the first and second counts. In this form of action the defendant is only liable for a breach of covenant; and, as has been already stated, a covenant to run with the land must touch and concern the land; and it appears from the lease that there were demised, not only fixtures, but moveable things, which are mentioned in the schedule—tools, utensils, and other things. And there is a covenant that the fixtures and other things should be kept in order and restored when worn out, and

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when restored kept in the same good working order. So far as that covenant relates to anything fixed to the land the covenant runs with the land, and for any breach committed during the defendant's time he will be liable on the first count; and any breach which may have been committed during Banks's time, after the assignment from the defendant, will be matter to be taken into account in assessing the damages against the defendant on the second count. But as to the moveable things, the covenant does not run with the land, as the mode in which they were dealt with could not have affected the land, and for anything connected with them the plaintiff cannot recover in the present form of action. For instance, a boiler, fixed to the land, though the tenant might be able to remove it at the end of the term, yet the keeping it there during the term would relate to the occupation and enjoyment of the land, and the covenant for keeping it there would run with the land. But covenants as to mere chattels cannot run with the land, and, as to such things, if the parties cannot wisely agree to refer all matters to the arbitrator, the mortgagor, who is the real plaintiff, will take advice as to bringing another action.

LUSH, J. I am of the same opinion, and have nothing to add to what my Brother Blackburn has said.

Judgment for the plaintiff.

Attorneys for plaintiff: *Gregory & Co.*

Attorney for defendant: *J. E. Fox, for Earle, Son., Orford, Earle & Milne, Manchester.*

GRIFFIN AND OTHERS *v.* WEATHERBY AND HENSHAW. 1868 *June* 26.

Bill of Exchange, Form of—Foreign Bill, when to be stamped—17 & 18 *Vict. c.* 83, *ss.* 3, 5—*Money had and received*—*Promise to pay on Transfer of Debt.*

In an action for money had and received, the following evidence was given. J. was indebted to the plaintiffs, and was also a creditor of the S. & F. Company, Limited, which was being wound up, and the defendant was the official liquidator. J. signed the following document: "Isle of Man, July 15, 1865. On 1st of August next, please to pay to Messrs. (the plaintiffs), or order 600*l.*, on account of moneys advanced by me to the S. & F. Company, Limited. To Mr. (the defendant), official liquidator of the said company." This document, which was unstamped when produced at the trial, was sent by J. to the plaintiffs in England, and they forwarded a copy to the defendant, who was also in England, requesting to know whether he would honour the order, and he replied he would when funds came into his hands about the 15th of August. Funds did come into his hands soon after that time, but owing to a dispute as to the amount remaining due to J. nothing was then paid; and after much correspondence, in which the plaintiffs continually demanded payment of the order, but never parted with it, this action was brought:—

Held, first, that the order, on the face of it, was not an order to pay out of a particular fund, but a bill of exchange; but, being drawn in the Isle of Man, it was a foreign bill for stamp purposes, and therefore need not be stamped except as required by 17 & 18 Vict. c. 83. ss. 3 and 5, viz. when "presented for payment, indorsed, transferred, or otherwise negotiated in the United Kingdom;" that it had not been dealt with in any of these ways, and was therefore admissible in evidence without a stamp.

Secondly, that the evidence shewed a contract binding on the defendant, within the principle of the decision in *Walker* v. *Rostron* (9 M. & W. 411).

ACTION for money had and received. Plea: Never indebted.

At the trial before Blackburn, J., at the Staffordshire spring assizes, 1867, a verdict was found for the plaintiff for 100*l.*, subject to a special case.

The plaintiffs are artificial manure manufacturers at Wolverhampton, and the defendants in July, 1865, were, and from thence hitherto have been, official liquidators of the Isle of Man Slate and Flag Company, Limited, which was then in the course of being wound up.

Henry Johnson, of Douglas, in the Isle of Man, had been managing director of the company, which was indebted to him in a sum exceeding 600*l.*, and he being indebted to the plaintiffs in a sum of 1000*l.* had, previously to July, 1865, placed in their hands

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as security for payment thereof certain shares in the company, and certain bills of exchange drawn by him upon and accepted by a Mr. Hicks, of Shrewsbury, which bills were overdue and dishonoured.

The plaintiffs having pressed Johnson for payment, he, on the 13th of July, 1865, gave them the following document:

"600*l.* "Douglas, Isle of Man, 13th July, 1865.

"On the first day of August next please to pay Messrs. Griffin, Morris, and Griffin [the plaintiffs] or order, six hundred pounds sterling, on account of moneys advanced by me for the Isle of Man Slate and Flag Company, Limited.

"HENRY JOHNSON.

"To Messrs. Henry Weatherby and John Henshaw [the defendants], official liquidators of the said company."

This document is unstamped, and its admissibility in evidence and effect is to be determined by the Court, but the plaintiffs are to be at liberty to pay the penalty and stamp duty (if the Court should determine that the document requires a stamp), in the same manner as they might have paid it at Nisi Prius: and on such payment the document may be received in evidence and read.

At the time of the drawing of the document the defendants and plaintiffs were resident in England, and it was sent by Johnson to the plaintiffs in England. On the 15th of July the plaintiffs' solicitors wrote to the defendant Weatherby the following letter:—

"July 15, 1865.

"We have received an order from Mr. Henry Johnson on you and Mr. Henshaw, to pay our clients, Messrs. Griffin, Morris, and Griffin, the sum of 600*l.* on the 1st day of August next, and on the other side we send you copy of the order. We shall be obliged by your writing us by return of post, saying whether you and Mr. Henshaw will honour this order on the 1st August."

A copy of the document as above set out accompanied this letter, and on the 17th of July the following answer was returned by the defendant Weatherby:—

"July 17, 1865.

"In reply to your letter, I beg to state that it is not certain that I and Mr. Henshaw would be able to honour Mr. Johnson's order on the 1st of August, but by the 15th of August we may

safely say that we shall be in a position to honour the order, upon the same being duly presented to us by you."

Some other correspondence then took place; the defendant Weatherby asking for further time; and in the meantime the debt of Johnson to the plaintiffs was reduced first to about 350*l.*, and ultimately to 100*l.*, which was the sum they sought to recover in this action. The plaintiffs' solicitors, after having repeatedly demanded payment of the order by letter, finally, being unable to get the money, wrote to the defendant Weatherby, requesting him to inform them whether he disputed his liability upon the order, and if so to name his attorneys who would accept service of writ. To which he replied:—

"Johnson's Order. "Oct. 15, 1866.

"I don't think I have at any time refused to recognize the fact that I have given my promise to honour this order as funds come to my hands on Mr. Johnson's account. I offered in November last to pay the remainder of the order then unpaid, viz. 100*l.*, when you stated you required 350*l.*; this I naturally refused to pay, and held the 100*l.* until March last, when I disposed of it in other ways. Had I cash in hand, I would pay it over without delay, but my co-liquidator looks to me to keep ourselves right, and as the affair is at present in our debt, I cannot do so. But you may depend upon me clearing the order immediately it is in my power to do so."

The defendant Henshaw had no knowledge whatever of any of the above facts, nor of the above correspondence having taken place until after the action was brought, when he was informed of what had occurred by Weatherby. The defendant Henshaw had given no authority to Weatherby to act as his agent or on his behalf in the matter, nor has he in any way ratified the said acts or correspondence.

The Court may amend the proceedings in the event of a misjoinder of defendants, in the same manner as they might have been amended at Nisi Prius.

The question for the Court was, whether the defendants were liable to pay the 600*l.*, or any part of it.

Macnamara (*Holl* with him), for the plaintiffs. The document

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given by Johnson to the plaintiffs is not a bill of exchange, and does not require a stamp. Although in the form of a bill of exchange, the latter part makes it payable out of a particular fund, and so prevents it being a bill negotiable according to the lex mercatoria: per Lee, C.J., in *Banbury* v. *Lisset*. (1)

[BLACKBURN, J. The form of acceptance there made it as if the order were "pay out of the freight as you receive it;" but are the words here "on account, &c.," more than an expression of value received from the company?]

If the document is ambiguous, recourse may be had to the surrounding circumstances to shew what the parties intended.

[LUSH, J. As far as the stamp is concerned, we can only look at what the document is on the face of it.]

Secondly, assuming the document to be a bill of exchange, it can be received in evidence without a stamp. Being drawn in the Isle of Man it is a foreign bill for stamp purposes, and by 17 & 18 Vict. c. 83, ss. 3 and 5 (2), the stamp on a foreign bill need not be

(1) 2 Str. 1211.

(2) 17 & 18 Vict. c. 83, s. 3:—"The duties by this act granted in respect of bills of exchange drawn out of the United Kingdom shall attach and be payable upon all such bills as shall be paid, indorsed, transferred, or otherwise negotiated, within the United Kingdom wheresoever the same may be payable, and the said duties shall be denoted by adhesive stamps, to be provided by the commissioners of inland revenue for that purpose, and to be affixed to such bills as hereinafter directed."

s. 4. "Every bill of exchange which shall purport to be drawn at any place out of the United Kingdom shall, for all the purposes of this act, be deemed to be a foreign bill of exchange drawn out of the United Kingdom, and shall be chargeable with stamp duty accordingly, notwithstanding that, in fact, the same may have been drawn within the United Kingdom."

s. 5. "The holder of any bill of exchange drawn out of the United Kingdom, and not having a proper adhesive stamp affixed thereon as herein directed, shall, before he shall present the same for payment, or indorse, transfer, or in any manner negotiate such bill, affix thereon a proper adhesive stamp for denoting the duty by this act charged on such bill; and the person who shall indorse, transfer, or negotiate such bill shall, before he shall deliver the same out of his hands, custody, or power, cancel the stamp so affixed by writing thereon his name or the name of his firm, and the date of the day and year on which he shall so write the same, to the end that such stamp may not be again used for any other purpose; and if any person shall present for payment, or shall pay or indorse, transfer or negotiate any such bill as aforesaid whereon there shall not be such adhesive stamp as aforesaid duly affixed, or if any person who ought as directed by this act to cancel such stamp in manner aforesaid shall refuse or neglect so

affixed till it is presented for payment, indorsed, transferred, or in any way negotiated, in the United Kingdom. The present bill has never left the plaintiffs' hands since it was sent to them by the drawer.

[BLACKBURN, J. *Sharples* v. *Rickard* (1) is in point.]

Even if the bill ought to be stamped, it can be stamped now; for, although 17 & 18 Vict. c. 83, requires a foreign bill to be stamped, there is no enactment in the statute as to foreign bills prohibiting their being stamped after they have been drawn, as in the case of inland bills by 31 Geo. 3, c. 25, s. 19; and therefore it comes within the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 29, and not within the proviso; and 24 & 25 Vict. c. 91, s. 32, enables the commissioners to affix an adhesive stamp to any document which may be stamped after the execution of it. By 23 Vict. c. 15, s. 12, the person who pays the bill is to write "paid" on it. If this document be admitted in evidence, there was ample evidence of an authority from Johnson, and a promise from the defendant Weatherby, to pay to the plaintiffs the money that should come to his hands available to pay the company's debt to Johnson, and the defendant admits having received such funds, and therefore money had and received will lie. The defendant Henshaw's name may be struck out under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 37.

H. James, for the defendants. This document is a bill of exchange; by 55 Geo. 3, c. 184, s. 8, the former enactments as to stamping bills of exchange are kept alive, and therefore it cannot be stamped after making. By the 19 & 20 Vict. c. 97, s. 7, bills drawn in the Isle of Man are inland bills of exchange.

[LUSH, J. But not with regard to the stamp.]

If it is to be treated as a foreign bill, still it ought to have been stamped. No doubt there has been no acceptance, because by

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to do, such person so offending in any such case shall forfeit the sum of 50*l.*; and no person, who shall take or receive from any other person any such bill as aforesaid, either in payment or as a security, or by purchase or otherwise, shall be entitled to recover thereon, or to make the same available for any purpose whatever, unless at the time when he shall so take or receive such bill there shall be such stamp as aforesaid affixed thereon, and cancelled in the manner hereby directed."

(1) 2 H. & N. 57; 26 L. J. (Ex.) 302.

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19 & 20 Vict. c. 97, s. 6, that must be in writing on the bill; but by 17 & 18 Vict. c. 83, s. 5, the holder, before he presents the bill for payment, must affix a stamp, and cancel it. Now, in the present case the correspondence shews, over and over again, a demand by the plaintiffs of payment of the bill, and the holder need not himself present the bill.

[BLACKBURN, J. Mr. Macnamara relied on 23 Vict. c. 15, s. 12; it cannot be said that the bill has been presented. In order to a presentment, the bill itself must be tendered.]

Assuming the document to be somehow receivable in evidence, there is no evidence to support money had and received; there is no evidence of any consideration for the defendant Weatherby's promise.

[BLACKBURN, J. *Walker* v. *Rostron* (1) is a direct authority against that proposition.]

It is clear that the defendant Henshaw cannot be made liable; and as the plaintiffs have gone down to trial well knowing the facts, he ought not to be struck out; at all events, it must be on the payment to him of his costs of the day.

BLACKBURN, J. The name of the defendant Henshaw must be struck out, on payment of his costs, as there was no evidence against him; he was not a partner, and had never authorized Weatherby to act as his agent in the matter. Against the other defendant I think the plaintiffs are entitled to judgment. The first question, putting aside for the moment the question of the stamp, is whether the circumstances are such as to entitle the plaintiffs to maintain an action against him for money had and received. Ever since the case of *Walker* v. *Rostron* (1), it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise; and the money becomes a

(1) 9 M. & W. 411.

fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder. Now there is no doubt that Johnson, being indebted to the plaintiffs, did sign this instrument intending the defendants should pay 600*l.* to the plaintiffs, and the intention was that the 600*l.* was to be paid by the defendants to the plaintiffs out of money of the company when it should come into the defendants' hands, and that it was not intended as a positive unconditional order from Johnson to the defendants to pay 600*l.* to the plaintiffs, but a direction to the defendants to pay to the plaintiffs that portion of the funds of the company due to Johnson, as soon as sufficient funds for the purpose had come into the defendants' hands. There also can be no doubt that the defendant Weatherby promised over and over again so to pay the money to the plaintiffs; and there is also no doubt that he had, as he unreservedly admitted he had, funds in his hands to pay the 100*l.* still remaining due from Johnson to the plaintiffs, which is all they now claim. He seems to have considered it an answer that the funds were no longer in his hands; but that is no defence. But there would be a defence, if it turned out that Johnson gave no order; and to prove the order a document is tendered in evidence which is objected to as requiring a stamp, and the question is whether this order is a bill of exchange requiring a stamp. First, is it a bill of exchange? For the plaintiffs it was contended that it was not, and in support of this was cited *Banbury* v. *Lisset* (1), in which it was held that an order, very much like the present, was an order to pay out of a particular fund, and was not a bill of exchange. In construing the instrument with reference to the present question we can only look at the face of the instrument itself, and notwithstanding the opinion of Lee, C.J., to the contrary, I cannot help thinking that the words "on account of moneys advanced by me for the Isle of Man Slate and Flag Company," must be taken to be inserted merely to explain why the order is drawn, as in the common phrase, value received, and not to make the order payable out of a particular fund or on a contingency. I am therefore of opinion that the document is a negotiable bill of exchange.

(1) 2 Str. 1211.

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That being so, does it require a stamp? It was drawn in the Isle of Man, and therefore for revenue purposes it is still a foreign bill. What, then, is the stamp required on a foreign bill drawn out of and payable in this country? No stamp was required on such a bill till 17 & 18 Vict. c. 83. By s. 3, the duties granted by that act in respect of bills drawn out of the United Kingdom, shall attach and be payable upon all such bills as shall be paid, indorsed, transferred, or otherwise negotiated within the United Kingdom, such duties to be denoted by adhesive stamps, to be affixed as thereinafter directed. Then s. 5 directs that the holder of a bill, drawn out of the United Kingdom, before he presents the bill for payment, or indorses, transfers, or in any manner negotiates it, shall affix the proper stamp, and cancel it; and 23 Vict. c. 15, s. 12, also requires the person when he pays the bill to write "paid" upon the stamp. The present bill, therefore, must have a stamp affixed when it is paid or presented for payment, indorsed, transferred, or otherwise negotiated; but I do not see that any one of these things has happened yet. In the instance of the present document it has not been paid, and it has not been indorsed. Presentment for payment must mean presentment according to mercantile usage; the document itself must be present, though not the holder. No doubt there has been ample notice and demand of payment, but there has been no presentment. Again, the bill has not been "negotiated;" negotiating must mean doing something which can only be done with a negotiable instrument. *Sharples* v. *Rickard* (1) is in point here; for it was there decided that presentment for acceptance was not negotiating; in the present case there has not been anything even that amounts to a presentment for acceptance. Therefore, on the whole, I have come to the conclusion that the present document must be stamped before it is paid, but that it may be used in evidence to prove the order of Johnson. And that being so, the facts legally proved bring the case within *Walker* v. *Rostron* (2), and consequently the plaintiffs are entitled to judgment as against Weatherby.

LUSH, J. I am of the same opinion. There is abundant evidence that Weatherby promised to pay 600*l.* to the plaintiffs, provided

(1) 2 H. & N. 57; 26 L. J. (Ex.) 302. (2) 9 M. & W. 411.

he had so much in his hands applicable to the debt due from the company to Johnson. The amount owing to the plaintiffs has been reduced to 100*l.*, and Weatherby admits having had moneys to this amount; therefore, if there is legal evidence of any authority from Johnson to Weatherby to pay it, the plaintiffs are entitled to succeed. If there is no evidence of such authority, or none that we can look at, then the defendants must succeed. That brings us to the consideration whether the document in question, which is the only evidence of authority from Johnson, can be read in evidence without a stamp; and that depends upon whether it is a bill of exchange which requires a stamp, or a draft or order in such a form as not to be a negotiable bill of exchange. It is objected that it is not a bill because it orders payment out of a particular fund by reason of the words "on account of moneys advanced by me for the Isle of Man Slate Company;" but that appears to me merely to denote the consideration for the order, and is merely an equivalent phrase to "value received." If the defendant had accepted generally, would he not have been absolutely bound to pay on the 1st of August, whether he had funds of the company in his hands or not? Most assuredly, as it seems to me, he would. Therefore, this is a bill of exchange. Then, is it such a bill of exchange as must be stamped? It was drawn in the Isle of Man upon the defendant in England, and therefore, for the purposes of the revenue, it is a foreign bill, although made an inland bill for other purposes by 19 & 20 Vict. c. 97, s. 7; and as a foreign bill, it need not be stamped when drawn: but by 17 & 18 Vict. c. 83, ss. 3 and 5, it is to be stamped whenever it is presented for payment, indorsed, transferred, or otherwise negotiated. Now I am clearly of opinion that the bill has not been dealt with so as to bring it within the terms of these sections. "Presented for payment" must mean such a presentment as would be sufficient to charge indorsers or other persons collaterally liable on the bill, and the document itself must be presented, so as to enable the person presenting to give it up if paid; therefore the bill has not been presented. The bill has clearly not been indorsed. "Transferred or negotiated," I understand to mean passed away from the original holder to another person; but the bill has never been out of the plaintiffs' possession; they have never dealt

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with it in any manner. Therefore I am of opinion that there is nothing to prevent this document being read in its present state without a stamp; and there is then proof of authority from Johnson to Weatherby to pay money, already or when in his hands, belonging to Johnson, to the plaintiffs; Weatherby has promised so to pay, and has had money, and he is therefore bound to pay.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Underhill & Field.*
Attorneys for defendants: *Blake & Snow.*

April 22.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF HESSLE AND OTHERS, RESPONDENTS, *v.* WATSON, APPELLANT.

Poor-rate—Division of Parishes for Civil and Ecclesiastical Purposes.

The district of Tranby has commonly been called a township or hamlet, but it has never maintained its own poor or highways separately, nor appointed a constable. It lies adjacent to Hessle and Kirk Ella, which are both ancient immemorial parishes, each having a church. Hessle consists, independently of the disputed district of Tranby, of the township of Anlaby and the township of Hessle. Anlaby maintains its own poor and highways separately, having its own overseers. The overseers of Hessle make poor-rates for the remainder of the parish of Hessle, which are commonly called rates for the township of Hessle. For the last hundred years and, for anything that appears to the contrary, before that time, the lands in Tranby have been rated to the poor and highway rates of Hessle, and the overseers and surveyors of that part of Hessle parish have acted for Tranby as if it were part of their district. But the lands in Tranby, from the earliest period, have been titheable in Kirk Ella, as being situate in that parish; and the occupiers have been rated to the church rates in that parish; and as to all ecclesiastical matters, Tranby has uniformly and immemorially been treated and reputed as part of the parish of Kirk Ella:—

Held, that the rating of Tranby to the poor-rates of Hessle must be supported, as it was impossible to say that the usage might not have had a legal origin.

ON appeal by Joseph Watson to the quarter sessions for the east riding of the county of York against a poor-rate of the parish of Hessle, the rate was confirmed, subject to the opinion of the Court on a case settled pursuant to a rule of court, by which the Court were to draw inferences of fact.

1—5. On the 1st of September, 1865, a poor-rate was made in conformity with the valuation list then in force by the overseers of the parish of Hessle. By this rate the appellant and four of the respondents were rated in respect of lands in their respective occupation in the township or hamlet of Tranby. The rate was headed "Poor-rate. Township of Hessle. An assessment for the relief of the poor of the township of Hessle, and for other purposes chargeable thereon, according to law, made," &c.

6. The question raised on the appeal is whether the appellant and the four respondents are liable to be rated in respect of their respective occupations of the property locally situate in the township or hamlet of Tranby, it being contended on behalf of the appellant that he and they were not legally liable to be rated in respect of such property in the parish of Hessle, but in the adjacent parish of Kirk Ella, of which it was contended that Tranby formed a part.

7. The parishes of Hessle and Kirk Ella are both ancient immemorial parishes. Hessle consists, independently of the disputed district of Tranby, of the township of Anlaby and the township of Hessle, the former of which maintains its own poor and highways separately, and has its own overseers and surveyors. The overseers of Hessle make poor-rates, which rates, like the present rate, are commonly called rates for the "township of Hessle," but which rates for a considerable time past, as hereinafter mentioned, have included the lands of Tranby.

8. The district of Tranby has commonly been called a township or hamlet, but it has not maintained its own poor or highways separately, nor appointed a constable. It consists of a considerable tract of agricultural land, having on it three or four gentlemen's residences, one of which has a lodge and farmhouse attached to it. It is adjacent to Hessle, and also to Kirk Ella, but the residences in Tranby, with one exception, are nearer to the parish church of Hessle than to that of Kirk Ella.

9. For about the last hundred years and, for anything that appears to the contrary, before that time, the lands in Tranby have been rated to the relief of the poor of Hessle, exclusive of the township of Anlaby, and the overseers of that part of Hessle parish have acted for Tranby as if it were a part of their district.

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The earliest rate of which there is evidence is that of the year 1765, and in that and the six succeeding years the ratepayers of Tranby, though included in the Hessle rates, are inserted in a list by themselves, headed "Tranby Tenants," and ending with a summary of the amount under the head "Total Tranby Assessments;" but this practice was not continued after 1772, and all the persons rated both in Hessle and Tranby are included in one general list.

10. The Tranby lands have also, as far back as the memory of living witnesses extends and, for anything that appears to the contrary, beyond that time, been rated to the highway rates of Hessle, exclusive of Anlaby, and the Hessle surveyors of highways repaired the roads of Tranby as if it were a part of their district. The county rate also, which was made upon or in respect of Hessle, exclusive of Anlaby, included the lands of Tranby.

11. On the other hand, the lands in Tranby, from the earliest period, were titheable to Kirk Ella, as being situate in that parish. The occupiers were always rated to and paid church rates in that parish, and also Easter dues, and all other ecclesiastical dues, and never paid tithes, church rates, or any ecclesiastical dues to Hessle. Some of the residents of Tranby had seats in the parish church of Hessle, but not as of right, and some of the bodies of deceased inhabitants of Tranby had been buried in the church or churchyard of Hessle, but this was only under permission, and not as of right, and double fees had been charged, as in the case of strangers. The incumbent of Hessle sometimes married Tranby people when it was wished he should do so, but he married them not at Hessle, but at Kirk Ella Church by the permission of the incumbent of that parish. In fact, as to all ecclesiastical matters, Tranby has uniformly and immemorially been treated and reputed as a part of the parish of Kirk Ella.

12. In the year 1792 an act of parliament was passed (32 Geo. 3, c. 109), intituled "An act for dividing, enclosing, draining, and improving the open fields, meadows, pastures, commons, and waste grounds within the several townships or hamlets of Hessle, Anlaby, and Tranby, in the county of the town of Kingston-upon-Hull, and for making a compensation in lieu of tithe for certain ancient enclosed lands within the said several townships or hamlets, and

also within the township or hamlet of Wooferton, otherwise Wolfreton, in the said county."

13—24. [The act was to be referred to as part of the case, and the case set out sections of the act, and the award made by commissioners in pursuance of it, by which all the Tranby lands now in question are dealt with, and are declared to be in the township of Tranby and parish of Kirk Ella. But it is unnecessary further to set them out, as the Court intimated that the statute and award had no further effect beyond the purposes of the act, to which it was expressly limited by s. 11.]

25. The practice above mentioned of rating Tranby lands to the poor-rate, as a part of Hessle, was continued without opposition or objection until recently, when the parish of Hessle, finding their existing burial ground insufficient, expended a considerable sum of money, exceeding 1500*l.*, in purchasing a new burial ground, and in the expenses connected therewith, which expenditure, under the recent burial acts, became a charge on their poor-rates. The rate-payers of Tranby, who were entitled as of right to bury in the churchyard of Kirk Ella, which was sufficient for the necessities of that parish, and was likely to continue sufficient for many years to come, objected to this new charge upon them, and became desirous if they could do so to put an end to the practice of rating the lands in Tranby as a part of Hessle parish. And the present appeal was brought with the concurrence of all of them to try its validity.

The question for the opinion of the Court was whether the lands and tenements in Tranby, as to which the appeal was brought, or any of them, are liable to be rated to the relief of the poor in the parish of Hessle.

Prideaux, Q.C., and *Lewers*, for the respondents. A township may separately maintain its own poor and be separated for civil purposes, and yet be part of another parish for ecclesiastical matters: *Rex* v. *Leigh* (1); and the fact of a single rate for the relief of the poor is strong evidence that the two parishes or townships are one: *Sharpley* v. *Mablethorpe* (2); or at least that Tranby was part of Hessle for civil purposes, at the time of 43 Eliz. c. 2,

(1) 3 T. R. 746. (2) 3 E. & B. 906; 24 L. J. (M. C.) 35.

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and the powers of that statute are extended to all townships and villages by 13 & 14 Car. 2, c. 12, s. 21 (1): *Rex* v. *Rufford* (2), *Rex* v. *Welbeck*. (3) *Dawson* v. *Willoughby* (4) is no authority against the proposition that a part of a parish may be united with another parish for civil purposes if there be evidence that the part was a vill or township separately maintaining its own poor; which may originally have been the case of Tranby. The case of *Reg.* v. *Ashby Folville* (5) will be cited contrà, but that only shews that one parish cannot make a binding agreement to repair the highways in another parish.

[MELLOR, J. In *Reg.* v. *Clayton* (6), the Court held the fact of the district paying tithes to a particular parish was strong but not conclusive evidence to shew that the district was in that parish, and not a separate parish of itself.]

No doubt that fact is primâ facie evidence at the present day; but in early times the division of parishes was purely an ecclesiastical division and not recognized in a court of law: Vin. Ab. tit. Parish, where it is pointed out that vills were long anterior to parishes, and may be distinct districts though they are sometimes conterminous. This consideration will account for the somewhat

(1) 13 & 14 Car. 2, c. 12, s. 21, after reciting that the inhabitants of Lancashire, Cheshire, Derbyshire, Yorkshire, Northumberland, Durham, Cumberland, and Westmoreland, and many other counties of England and Wales, by reason of the largeness of the parishes within the same, have not and cannot reap the benefit of the statute of 43 Eliz. for relief of the poor, enacts, "That all and every the poor, needy, impotent, and lame person or persons within every township or village within the several counties as aforesaid, shall, from and after the passing of this act, be maintained, kept, provided for, and set on work, within the several and respective township and village wherein he, she, or they shall inhabit, or wherein he, she, or they was or were last lawfully settled, according to the intent and meaning of this act; and that there shall be yearly chosen and appointed, according to the rules and directions of 43 Eliz. c. 2, two or more overseers of the poor within every of the said townships or villages, who shall from time to time do, perform, and execute all and every the acts, powers, and authorities for the necessary relief of the poor within the said township or village, and shall lose, forfeit, and suffer all such pains and penalties for non-performance thereof, as is limited, mentioned, and appointed in and by the said in part recited act."

(2) 1 Str. 512.

(3) 2 Str. 1143.

(4) 5 B. & S. 920; 34 L. J. (M.C.) 37.

(5) Law Rep. 1 Q. B. 213.

(6) 13 Q. B. at p. 362.

anomalous position of Tranby as regards Kirk Ella. In *Lousley* v. *Hayward* (1), it was held that a pew in a church might be prescribed for in respect of a house out of the parish; that, again, has a strong bearing on the present case. Whatever may have been the origin of the tithes of Tranby being paid to Kirk Ella, it is sufficient for the present purpose of the poor-rate if there be evidence to shew that Tranby formed part of the reputed township of Hessle at the time of 43 Eliz.: *Nichols* v. *Walker* (2); *Hilton* v. *Pawle*. (3) [They also maintained that under the statute of 32 Geo. 3 the commissioners had no power to define the boundary of the parishes; and the Court intimated that at most the statute and award went no further than, and were perfectly consistent with, the other evidence in the case. (4)]

T. P. E. Thompson, for the appellant. It is clear Tranby is not extra parochial; and the question is, is it part of the parish of Kirk Ella, or of Hessle? A township must be altogether in one parish or another; it cannot be in one parish for ecclesiastical purposes, and in another for civil purposes; and the evidence, therefore, shows that Tranby is in Kirk Ella. The only case against the appellant is *Sharpley* v. *Mablethorpe* (5), but in that case it was really immaterial whether the lands in question were rated in the district as a whole, or in the one part of it as a separate parish. Here it is most material, as appears from the last paragraph. The inference to be drawn from the fact that the lands in Tranby have been rated to the poor rates of Hessle, is that it was by an arrangement for mutual convenience. The Court drew a similar inference in the case of *Reg.* v. *Ashby Folville* (6), where

(1) 1 Y. & J. 583.

(2) Cro. Car. 394.

(3) Cro. Car. 92.

(4) The following passage from Domesday, Yorkshire, by Bawdwen, p. 191, was also referred to by counsel on both sides:—

EAST RIDING.

III. Manors. In Alvengi (Kirk Ella), Alwin, Chetel, Canute had twenty-three carucates of land to be taxed. . . . . There is a church and a priest. Value in King Edward's time 8*l*., now 6*l*.

Manor. In Hase (Hesle) Alwin and Chetel had seven carucates of land to be taxed. . . . . There is a church and a priest. One mile long and a half broad. Value in King Edward's time 60s., now 50s.

Manor. In Umlouebi (Anlaby) Canute had three carucates of land and a half to be taxed. . . . . Value in King Edward's time, 40s., now 50s.

(5) 3 E. & B. 906; 24 L. J. (M.C.) 35.

(6) Law Rep. 1 Q. B. 213, 217.

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Cockburn, C.J., delivering the judgment of the Court, says: "The proper conclusion therefore is, we think, that the repair of this highway [in another parish] by the parish of Gaddesby resulted from some arrangement come to between these parishes from considerations of mutual convenience, and which therefore could at any time be put an end to by either."

[LUSH, J. Unless the appellant can shew us by authorities that the state of things which now exists cannot have had a legal origin, must we not uphold the usage which has existed for 100 years and, for anything that appears to the contrary, longer?]

It is a violent presumption to suppose that tithes have been appropriated to a church without the parish. In *Rudd* v. *Foster* (1) it was held that a vill A which contributed to the repairs of the church of B, and performed all its ecclesiastical rites in that church, must be taken to be in the parish of B, at the time of 43 Eliz. c. 2, although it had separate overseers and a constable, and separately maintained its own poor, and that the lands in A were therefore liable to be rated to the poor rates of B. *Dawson* v. *Willoughby* (2) is also an authority that a part of one parish cannot legally be united to another parish for any civil purpose.

MELLOR, J. I am of opinion that the sessions were right in affirming this rate. No doubt there is some difficulty arising from the peculiar circumstances of this case; but unless Mr. Thompson can shew us that there is some legal objection that prevents the continuance of the state of things which has lasted so long, we ought not to disturb it; and, as Lord Campbell said in *Sharpley* v. *Mablethorpe* (3), "I can see no sufficient legal ground for disturbing a usage which has prevailed so long." It may be that this state of things arose before the origin of parishes. We know that churches were first built in many places by the owners of the land, and the tithes of a particular district were assigned by the owners to particular churches, and this might be anterior to the actual division into ecclesiastical districts or parishes; and it may be that this district of Tranby had its tithes assigned to the church of Kirk Ella, and yet for civil purposes may still have belonged to the

(1) 4 Mod. 157; 2 Salk. 501.
(2) 5 B. & S. 920; 34 L. J. (M.C.)
(3) 3 E. & B. at p. 916; 24 L. J. (M.C.) at p. 39.

37. Wm. R. S240

district of Hessle cum Tranby. This district being thus formed into a township for all civil purposes, and so being a township at the passing of 13 & 14 Car. 2, c. 12, it may, under s. 21, have appointed overseers, and so first separately maintained its own poor, and thus acquired and retained ever since these characteristics of a township, while at the same time some arrangement or bargain may have been come to, or a tacit understanding arisen, that the inhabitants of Tranby, who are very few in number, were to continue to use the church of Kirk Ella, and this may account for the continued payment of tithes and ecclesiastical dues to Kirk Ella. We have it here that for a hundred years at least, and there is no evidence to the contrary, the lands in Tranby have uniformly been rated to the poor, and highways as part of the township of Hessle. Moreover, though I do not lay much stress upon that, it would appear that there was a manor of Hessle, but not of Tranby, and parishes generally followed the extent of the manor. (1) But without that, the weight of evidence goes to shew that this district of Hessle and Tranby is a district that properly maintained its own poor, and the overseers, therefore, had power to rate the appellant.

LUSH, J. I am of the same opinion. We ought not to disturb a state of things which has lasted so long, unless we can clearly see that it could not have had a legal origin. We find that for some hundred years the lands in Tranby have been rated to the poor-rates and highway rates of Hessle, and there is nothing to the contrary, while for ecclesiastical purposes Tranby has uniformly and immemorially been treated and reputed as part of the parish of Kirk Ella. I think there is more than one way in which this state of things may legally have originated. One, however, is sufficient: and as it seems to me not improbable that this which is now called a township or hamlet of Tranby was originally a part of the township of Hessle, I see no legal objection to prevent a township forming part of two parishes. Now that Tranby never was a separate township, seems to follow from the facts stated, as the incidents of a township are wanting to it, such as a constable, Tranby never having had one. But if Tranby formed part of the

(1) See ante, p. 767, note 4.

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township of Hessle, then the present status of Tranby may have had a legal origin, because by the statute of Charles, although the township was in two parishes, the entire township might have appointed separate overseers, and Tranby would thus have continued to be rated to the poor rate of Hessle.

HANNEN, J. It seems to me that if we assume that Hessle and Tranby were originally united as one township, all difficulties vanish, and I think we ought to assume this in support of a state of things which is shewn to have existed so long. That there was some such connection from a very early date we have both negative and positive evidence,—negative, that though the three divisions, or manors of Kirk Ella, Hessle, and Anlaby are mentioned, Tranby is not mentioned in Domesday (1), and was therefore most probably included in one of the other divisions,—positive, that the Tranby lands have been rated with Hessle for highway purposes; and as a township it may have been rated irrespective of the parish. Vill or township is a natural division: (see Co. Lit. 115 b, and other authorities cited in 3 Chitty's Statutes, 3rd ed. 1041); but parish is an artificial division; and it may very well be that when the parishes of Kirk Ella and Hessle were formed the artificial division of the two may have cut the township into two parts, and thus Tranby may have become part of the parish of Kirk Ella for ecclesiastical purposes, while for civil purposes it still remained attached to the old township of Hessle. That being a possible state of things at the time of the statute of 43 Eliz., subsequently the statute of 13 & 14 Car. 2, created another under which Tranby may have reverted to its old association with Hessle. This assumption seems to me to meet the difficulties of the case, and ought to be adopted in support of what has existed so long.

Order of sessions affirmed.

Attorneys for appellant: *Coverdale & Co.*
Attorneys for respondents: *Boys & Tweedies.*

(1) See ante, p. 767, note 4.

BROUGH, APPELLANT; HOMFRAY, AND OTHERS, RESPONDENTS. 1868 *June* 3.

Colliery, Ventilation of—23 & 24 *Vict. c.* 151, *s.* 10, *r.* 1.

By 23 & 24 Vict. c. 151, s. 10, rule 1 of the general rules to be observed in every colliery or coal mine and ironstone mine, by the owner or agent thereof, "an adequate amount of ventilation shall be constantly produced in all coal-mines, &c., to dilute and render harmless noxious gases to such an extent that the working places and the travelling roads to or from such working places shall, under ordinary circumstances, be in a fit state for working and passing therein":—

Held, that it was not sufficient compliance with this rule to cause ventilation to pass along the working places and travelling roads, but that so much of the mine must be kept so ventilated as to render the working places and travelling roads safe.

CASE stated by Justices of Monmouthshire under 20 & 21 Vict. c. 43.

1—3. An information was preferred by the appellant under ss. 10 and 22 of 23 & 24 Vict. c. 151, intituled "An Act for the regulation and inspection of Mines" (1), charging that the respondents being the owners of a certain colliery, called the Bedwellty Pit, did not cause an adequate amount of ventilation to be constantly produced in such colliery to dilute and render harmless noxious gases to such an extent that the working places of the pit's levels and workings of such colliery, and the travelling roads to and from such working places should, under ordinary circumstances, be in a fit state for working and passing therein.

(1) 23 & 24 Vict. c. 151, s. 10. The following rules, herein referred to as the general rules, shall be observed in every colliery or coal mine and ironstone mine by the owner and agent thereof:—1. An adequate amount of ventilation shall be constantly produced in all coal mines or collieries and ironstone mines, to dilute and render harmless all noxious gases to such an extent that the working-places of the pits, levels, and workings of every such colliery and mine, and the travelling roads to and from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein. 2. All entrances to any place not in actual course of working and extension, and suspected to contain dangerous gas of any kind, shall be properly fenced off so as to prevent access thereto.

Section 22. If any coal mine, colliery, or ironstone mine be worked, and . . . any of such general rules or special rules, provisions of which ought to be observed by the owner and principal agent or viewer of such coal mine, colliery, or ironstone mine, be neglected or wilfully violated by any such owner, agent, or viewer, such person shall be liable to a penalty of not exceeding 20*l* . . .

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4. It was proved that the respondents were the owners of the colliery called the Bedwellty Pit, and a plan of the workings in the colliery was proved and is to be taken as part of the case. (1)

5. The ventilation of the colliery passed down the pit and along the intake level until it got into the heading called Jones's heading, and it proceeded along Jones's heading into the cross heading called third crossing, a door in which at A diverted the ventilation, thence into and through the small cross heading, marked cross hole, into the heading called Roberts's heading, and by means of a brattice (that is a canvas partition) it was conducted into the upper part or fore end of Roberts's heading, to the face of the heading at B, and then backwards round the brattice and along Roberts's heading to the upcast shaft. The direction of the arrows shews the course of that part of the ventilation from the downcast or intake to its discharge at the upcast pit.

6. This had been the mode of ventilating this part of the colliery for more than a year before Wednesday, the 14th of June, 1865.

7. The top or fore end of Roberts's heading, and the top or fore end of Jones's heading, were each in solid unworked coal, and the third crossing and the cross hole was also driven in solid unworked coal, and the coal was entirely unworked and workable adjoining and around the fore end of Roberts's heading and Jones's heading, and the third crossing and the cross hole.

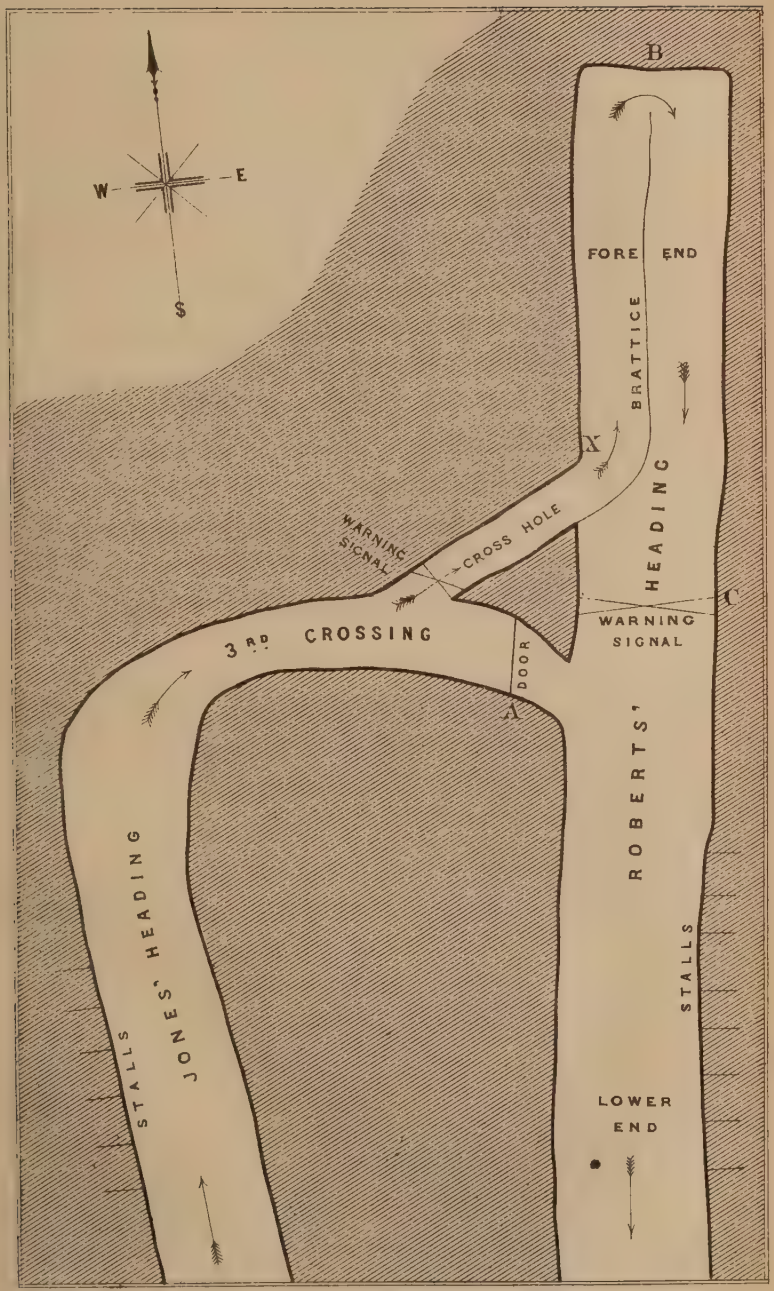
8. The stalls on the left or west side of Jones's heading, and other stalls in that heading, and the fore end of that heading, were being worked on the 14th, 15th, and 16th days of June, 1865, and had been continually worked previous to those days.

9. The stalls in the right or east side of Roberts's heading, and other stalls in that heading, were being worked on the 14th, 15th, and 16th of June, 1865, and had been continuously worked previous to those days.

10. The driving on of the fore end of Roberts's heading and the working of coal therein, had been temporally discontinued for about eighteen months before the beginning of June, 1865.

11. In the beginning of June, 1865, Mr. William Beavan, the manager of the colliery, gave direction to put the fore end of Roberts's heading above the third crossing into order and repair,

(1) The plan annexed sufficiently shows the part of the colliery in question.



☞ (*Not drawn to Scale from* X *to* B *is in fact nearly 60 Yards.*)

and one Richard Jenkins was employed for five or six days before the 14th June, 1865, working at the repairs of the fore end of Roberts's heading, above the third crossing, so as to resume operations therein, for the working of coal therefrom.

12. The third crossing and cross hole were part of the air way conducting the ventilation from Jones's heading into the fore end of Roberts's heading as before mentioned. The cross hole was about three feet high and four feet wide. In the beginning of the month of June, 1865, the manager of the works gave directions to enlarge and convert the third crossing into a roadway for bringing the coal worked on the fore end of Jones's heading into Roberts's heading, so that it might be taken down that heading to the level heading for conveyance to the surface.

13. David Jones, and his son, a boy about 13 years of age, were employed so to enlarge and convert the third crossing into a roadway, and they worked at such alteration until they had on the 14th of June completed it up to the door marked A, which diverted the ventilation into the cross hole and the fore end of Roberts's heading.

14. On the 14th of June, David Jones mentioned to the fireman of the colliery, John Jehu, who is an under agent, that he (David Jones) intended taking down the door; but he was told by the overman not to do so, as it would withdraw the ventilation from the cross hole and the fore end of Roberts's heading, and would be dangerous.

15. Notwithstanding such directions from the fireman to David Jones not to take down such door, he did so on the morning of the same 14th of June.

16. The consequence of the taking down of such door was, that the ventilation would not pursue its course into the cross hole and the fore end of Roberts's heading, but would pass direct along the third crossing into Roberts's heading and so down that heading towards the uptake pit.

17. Within half an hour after taking down the door, and such interference with the course of ventilation, the fore end of Roberts's heading would become filled with explosive gas, and be highly dangerous; and, in fact, shortly after the door had been so taken down, the fireman, John Jehu, found on examining the fore end of

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Roberts's heading that it had become filled with explosive gas, as the ventilation therein had ceased.

18. Upon the door being so taken down it became impracticable for Thomas Jenkins to continue his operations in the fore end of Roberts's heading in consequence of the ventilation there having ceased and explosive gas having accumulated therein, and he discontinued his work, but was to resume it as soon as the ventilation could be restored.

19. On the fireman, John Jehu, finding on the morning of the 14th of June, which he did immediately it was done, that the door had been so taken down, he put up the fences and warning signals across the little cross hole, and at the point marked C of Roberts's heading, just above, or to the north of the point where the third crossing enters Roberts's heading, so as to prevent access either to the cross hole or to the fore end of Roberts's heading. The justices found that there was no intention to resume work in or allow any one to enter any part of the fore end of Roberts's heading until the ventilation thereof had been properly restored.

20. It was communicated to William Beavan, the colliery manager, by Richard Jenkins, on the 14th of June, 1865, in answer to an inquiry in the street why he was not at work, that David Jones had taken down the door, and William Beavan directed Richard Jenkins to tell John Jehu, the fireman of the colliery, to replace the door immediately, and that direction was given to John Jehu, but he did not replace the door, alleging that it would be dangerous to do so till Saturday, when the men would be out of the colliery. (1)

21. On the morning of Thursday, the 15th of June, William Beavan had a conversation with John Jehu personally, and also with John Reynolds, the overman of the colliery, as to replacing the door, but William Beavan, John Jehu, and John Reynolds, all agreed that it would be dangerous to do so, from the quantity of gas accumulated in the fore end of Roberts's heading, while

(1) The case had been sent back to be restated, and to have a copy of the evidence appended, which was accordingly done; it was explained in the evidence that the danger from putting up the door would have arisen in this way, that the ventilation being again directed into the fore end of Roberts's heading the gas would have been driven thence into the lower end of the heading and other working places.

the men were at work in the colliery, and that it would not be safe to do so until the following Saturday night, when the men would be out of the colliery, and it was delayed accordingly.

22. David Jones and his son, on Wednesday the 14th, Thursday the 15th, and on Friday the 16th, until the explosion hereinafter mentioned occurred, continued their work in the third crossing. The other workmen continued their operations on the 14th, 15th, and on the 16th (until the explosion), in the lower or southern end of Roberts's heading, and the stalls opening out of it, and in Jones's heading and the stalls leading out of it, and in the other parts of the colliery.

23. On Friday morning a violent explosion occurred in Roberts's heading, but how it occurred could not be ascertained. David Jones and his son, and several persons were killed, and several others were also injured.

24. The fireman had, on the morning of the explosion before it occurred, been through the work to examine the condition of the ventilation, and he had that morning, pursuant to his duty, by pushing his lamp between the fencing, found that the fore end of Roberts's heading was filled with the accumulation of gas as it was on Wednesday after taking down the door, and also on Thursday. The fencing was put up with a view to prevent access to such gas.

25. The justices dismissed the information on the ground that they were of opinion that the top of Roberts's heading was not, on the facts proved, a working place on the 16th of June, 1865, within the meaning of the first general rule in s. 10 of 23 & 24 Vict. c. 151. (1)

26. If, upon the evidence (2), the Court thinks that in point of law there was no wilful violation of the first general rule on the 16th of June, and that under ordinary circumstances an adequate amount of ventilation was produced in the working places of the colliery to dilute and render harmless noxious gases, and that the fore end of Roberts's heading was on the said day not a working place within the meaning of the said first general rule, and that the respondents should not have been convicted, then the information was properly dismissed; but if, in the opinion of the Court, it was otherwise, then the respondents should have been convicted.

(1) See note, ante, p. 771. (2) See note, ante, p. 774.

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Manisty, Q.C. (with him *H. Matthews, Q.C.*), for the appellant. The justices seem to have interpreted Rule 1 as if it were only necessary to keep up ventilation in the working places and roads themselves, but it is clear that the whole mine must be so ventilated as to keep the places actually occupied by the workmen in a fit state for working. The explosion took place in Roberts's heading, without doubt, from the escape of gas from the top or fore end. As soon as the door at A was removed, the current of air,—instead of passing out of the third cross heading, through the cross hole, and so into the fore end of Roberts's heading, up one side of the brattice and down the other,—went direct through the doorway into the lower end of Roberts's heading, leaving the fore end entirely without ventilation. Although there was no work going on at the top, the working was continued all along in the stalls at the lower end. Rule 1 was therefore clearly violated.

The Court then called upon

H. James, for the respondents. The fore end of Roberts's heading was not a working place within Rule 1, and there is no evidence that the gas escaped from thence into the lower end; on the contrary, the course of ventilation, after the door was taken down, would keep the gas entirely above the third crossing. Rules 1 and 2 must be read together, and Rule 2 had been complied with by the barriers or warning signals put up across the end of the cross hole, and across Roberts's heading above the third crossing.

[MELLOR, J. Rule 2 is only an additional precaution, and cannot be taken as narrowing the first rule.]

The inference to be drawn from the evidence is, that the explosion took place above the barriers from some one having removed them; if so, the respondents were not liable for the consequence.

[COCKBURN, C.J. Why should it be assumed that the workmen were not in their usual place?

BLACKBURN, J. Paragraph 21 shews that the overmen were aware of the great accumulation of gas in the upper end of Roberts's heading. The dangerous part might have been shut off entirely from the lower end by a door or partition, or the men ought immediately to have been withdrawn.]

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COCKBURN, C.J. We are agreed that there is evidence going to shew that the ventilation was not sufficient to keep the working places and roads in a fit state for working and passing in. It is not enough that the working place itself has been ventilated; but the intention of the rule is that the mine, or at least so much of it as is sufficiently contiguous to a working place as that it may operate upon a working place, should be kept ventilated. The justices, on the contrary, seem to have thought the rule was sufficiently complied with if the ventilation was kept up in the working places; and the facts are not sufficiently found to shew whether the explosion arose in the upper end or lower down in Roberts' heading. At all events the case must go back to the justices, with the intimation of our opinion that though the working places were sufficiently ventilated, if the parts contiguous were not ventilated, the rule has not been complied with.

BLACKBURN, J. The rule requires the mine to be ventilated to such an extent as to make the working places and travelling roads safe for ordinary use.

MELLOR, J., concurred.

LUSH, J. The owners or agents of the mine are bound to ventilate the mine so as to keep the working places safe.

PER CURIAM. The case must be remitted to the justices, with the intimation of the opinion of the Court, that it is not enough to ventilate the working places and travelling roads; but that so much of the mine must be kept so ventilated as to render the working places and travelling roads safe.

Case remitted accordingly.

Attorneys for appellant: *Sharp & Ullithorne.*
Attorney for respondents: *T. Clark.*

1868
June 10.

DOBSON *v.* RICHARDSON AND OTHERS.

Practice—Interrogatories by the Defendant to the Plaintiff as to the amount of Damages.

In an action claiming 20,000*l.* damages for the breach of an agreement to deliver certain bills of exchange of a company, as to which the defendants had paid one shilling into court, the Court allowed interrogatories to be exhibited to the plaintiff as to the solvency of the company and the amount of damages which he had sustained by the non-delivery of the bills.

DECLARATION on a memorandum of agreement between the plaintiff and the defendants, that the claim of the plaintiff against the Anglo-Greek Steam Navigation and Trading Company, Limited, should be settled upon certain terms, inter alia, 15,000*l.* of the Railway Finance Company's bills to be handed to the plaintiff by the defendants without recourse to the Anglo-Greek Steam Navigation Company, or any other party, except the Railway Finance Company. Breach, that the 15,000*l.* Railway Finance Company's bills had not been handed over to the plaintiff as agreed. Claim, 20,000*l.*

Plea: Payment of one shilling into court, as enough to satisfy the claim of the plaintiff.

By the order of Montague Smith, J., the following interrogatories were to be exhibited to the plaintiff:—

1. Were you at the time of making the agreement declared upon a member of the Railway Finance Company, Limited, or the Financial Agency Company, Limited, or were you connected with, or interested in, either of them or the affairs thereof? If yea, state how and in what manner. 2. Is it not the fact that the Railway Finance Company, at the time of making the agreement, was wholly insolvent; and has not the company, since then, continually been and is it not now insolvent; and is it not a fact that its finances were and are in such a state that the creditors will never receive any dividend in respect of their claims? 3. Is it not a fact that the bills mentioned in the agreement have, since the making the agreement, been, and are they not now, valueless; is it not the fact, that by reason of the bills being of no value, or on some other and what account, you have sustained and will

sustain no actual damage by reason of the non-delivery of the bills? If you have sustained or will sustain any damage, state the nature of such damage, how and in what manner you have been or will be damnified. 4. Are you a debtor to the Railway Finance Company to any, and if any, to what amount?

Murphy, for the plaintiff, moved to rescind the order, citing *Jourdain* v. *Palmer*. (1)

THE COURT (Cockburn, C.J., Lush and Hannen, JJ.) declined to act on that case; no objection could reasonably be made to these interrogatories.

Rule refused.

Attorneys for plaintiff: *G. S. & H. Brandon.*

(1) Law Rep. 1 Ex. 102.

END OF TRINITY TERM.

REGULÆ GENERALES.

JURISDICTION OF THE COMMON LAW MASTERS AT CHAMBERS.

MICHAELMAS TERM, 1867.

WHEREAS, by the statute made and passed in the Session of Parliament held in the 30th & 31st years of the reign of Her Majesty, intituled "An Act to provide for the better dispatch of Business in the Chambers of the Judges of the Superior Courts of Common Law," It is enacted that it shall be lawful for a majority of all the Judges of the said Courts, which majority shall include the two Chief Justices, or one of the Chief Justices and the Chief Baron, from time to time to make and publish General Rules for certain purposes therein mentioned.

IT IS THEREFORE ORDERED that the Masters of the said Courts of Common Law at Westminster be, and each of them is hereby empowered and required to do all such things, and transact all such business, and exercise all such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the Rules and practice of the said Courts, or any of them respectively, were at the time of the passing of the said Act, and are now done, transacted, or exercised by any Judge of the said Courts sitting at Chambers, except in respect of matters relating to the liberty of the subject, and except (unless by consent of the parties)

in respect of the following proceedings and matters; that is to say:—

All matters relating to Criminal Proceedings;

The removal of Causes from inferior Courts, other than the removal of judgments for the purpose of having execution;

Prohibitions and Injunctions;

The referring of Causes under the Common Law Procedure Act, 1854;

The rectifying of omissions or mistakes in the Register under the Joint Stock Companies Acts;

Interpleader—other than such matters arising in Interpleader as relate to practice only;

Discovery—whether by inspection of documents, interrogatories, or otherwise;

Reviewing taxation of costs;

Staying proceedings after verdict;

Acknowledgments of married women;

Leave to sue in formâ pauperis;

Orders charging Stock, Funds, Annuities, or Share or Dividends, or annual produce thereof.

That in case any matter shall appear to the Master to be proper for the decision of a Judge, the Master may refer the same to a Judge, and the Judge may either dispose of the matter or refer the same back to the Master, with such directions as he may think fit.

That Appeals from the Master's Order or decision shall be made by Summons, such Summons to be taken out within four days after the decision complained of, or such further time as may be allowed by a Judge or Master.

The Appeal to be no stay, unless so ordered by a Judge or Master.

The Costs of such Appeal shall be in the discretion of the Judge.

That all Summonses be issued by a Judge as heretofore; but that Orders by the Masters be made in their own names.

1 Hare v. Harbord 5 Ex 17.

That the Scale of Costs for all matters done by and before the Masters shall be the same as are fixed for business done by and before the Judges.

That the same fees shall be taken in respect of business transacted before the said Masters at Chambers, as are now taken when the same business is transacted before a Judge.

That these Rules take effect on the 1st of January, 1868.

A. E. Cockburn.
W. Bovill.
Fitz-Roy Kelly.
Samuel Martin.
J. S. Willes.
G. Bramwell.
W. F. Channell.
J. Barnard Byles.
Colin Blackburn.
H. S. Keating.
John Mellor.
G. Pigott.
Wm. Shee.
Montague Smith
Robert Lush.

Read in the Courts of Queen's Bench, Common Pleas and Exchequer of Pleas, 25th day of November, 1867.

ENTERING CAUSES FOR TRIAL IN LONDON AND MIDDLESEX.

TRINITY VACATION, 1868.

It is Ordered that from and after the first day of Michaelmas Term next inclusive, the Rule 43 of Hilary Term, 1853, be rescinded, and that in lieu thereof the Rule for the entry of all causes for trial in London and Middlesex shall be as follows (that is to say):—"Causes for every sitting within Term or after Term shall be entered before five o'clock, P.M., on the day next but one preceding the first day of such sitting."

July 9, 1868.

QUEEN'S BENCH.

MICHAELMAS TERM, 1867.

It is Ordered that no case whether in the Crown, New Trial, or Special Paper, which by order or arrangement stands over generally, shall be inserted in the list of cases for argument, but such case shall, on notice to the Masters, be restored to its proper place on the Lists.

Nov. 8.

HILARY TERM, 1868.

It is Ordered that on motion founded on affidavits made on the Crown side of this Court after this present Term, it shall be lawful for either party with leave of the Court or a Judge to make affidavits in answer to the affidavits of the opposite party upon any new matter arising out of any such affidavits.

Jan. 23.

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ACT FOR THE PROTECTION OF GARDEN OR ORNAMENTAL GROUNDS IN CITIES AND BOROUGHS (26 VICT. c. 13), ss. 1, 2—"*Garden set apart otherwise than by revocable permission of Owners for use of the Inhabitants of a Square.*"] In 1786, the representatives of T. and P. respectively, being tenants in common in fee of the land and houses forming a square in London, with the garden in the middle, a decree in chancery for a partition was obtained, and a commission issued. The commissioners certified that the land and houses on the north side should be allotted to the P.s in fee, and the land and houses on the other three sides, together with the garden, to the T.s in fee; that the lessees of houses, &c., on the north side should continue to pay to the owners of the second allotment the sum reserved in their leases towards keeping up the square garden; and that the owners of the second allotment should for ever keep and maintain the garden in its then state as a pleasure ground. A decree was then made that the estates should be held in severalty, as allotted by the certificate; and mutual conveyances were executed accordingly, which recited the decrees and certificate: but there was no covenant on the part of the owners of the second allotment to keep up the square garden. At the time of the partition most of the leases granted by the original coparceners, under whom T. and P. claimed, were in existence, and the last lease did not expire till 1847, and in the leases there were covenants by the lessees to pay certain small annual sums towards keeping up the square garden, and covenants on the part of the lessors to apply them to that purpose. In 1807, J. T., the then tenant for life, and his son, C. T., the tenant in tail in remainder, of the property in the second allotment, executed a conveyance (which was carried out by a recovery), by which C. T., the son, took in fee the hereditaments on the east and partly south side of the square and the square garden, and J. T. took the hereditaments on the west and the rest of the south side, and C. T. covenanted for himself, his heirs, &c., with J. T., his heirs, &c., for ever after to keep the square garden in its then state and in good repair, &c. In 1808, C. T. conveyed the square garden in fee to E., who covenanted with C. T., &c., to keep the garden in its then state, and that it should be lawful for

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J. T. and C. T., and their respective tenants, inhabitants of the square, on payment of a reasonable sum, to have keys and admission at all times into the garden. Up to 1851 the garden was constantly used as a promenade and place of recreation by such of the inhabitants of the square as chose to pay a guinea or a guinea and a half per annum to the owners for the time being of the garden, for keys. After several mesne assignments, in 1851, the garden became vested in fee in W., who proposed to erect a building in it. L. T., the devisee from J. T. of all his share in the property conveyed to him by the deed of 1807, and the owners of most of the property in the square comprised in that deed opposed this, and by an agreement between them and W. they granted him a licence to erect and maintain the proposed building for ten years, provided that the licence should not operate as a waiver of the covenants in the deeds of 1807 and 1808; and W. covenanted to restore the garden at the end of the ten years to its former state. At the end of the ten years W. removed the building, and the plaintiff (who was also joint-devisee under the will of L. T. of J. T.'s share), as heir-at-law of L. T., exercised an option, given to L. T. in the agreement of 1851, of purchasing an undivided moiety of the garden; and the garden accordingly, by a deed of 1861, became vested in the plaintiff and W. as tenants in common in fee. The owners of the houses on the north side of the square were no parties to any dealing with the garden. In 1865, the garden being in a neglected and dilapidated state, the Metropolitan Board of Works took possession of it, under 26 Vict. c. 13, s. 1, which enacts that "where in any city or borough any enclosed garden or ornamental ground has been set apart, otherwise than by the revocable permission of the owner thereof, in any public square, &c., for the use or enjoyment of the inhabitants thereof, and where the trustees or other body appointed for the care of the same have neglected to keep it in proper order, or where such garden or ground has not been vested or placed under the management of trustees, &c., for the care of the same, and from want of such care or any other cause has been neglected, the Metropolitan Board of Works, where the same is within their jurisdiction (except in the city of London), and in any other city or borough the corporate authorities, shall take charge of the same, putting up a notice to that effect in such garden or ground;" the plaintiff having brought an action of trespass against the Board:—*Held*, affirming the judgment of the Queen's Bench, that, whatever might be the rights at law or in equity of the owners and occupiers of the houses round the square, the garden had not been set apart for the use or enjoyment of the inhabitants of the square otherwise than by the revocable permission of the owner, within the meaning of the above section; and, that consequently the Board were trespassers. *Quære*, whether the case was within the second section of the act.
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was within the meaning of s. 4, though his articles had been executed before the expiration of the ten years service; and that the requirements as to the ten years service were satisfied by his having been employed *as a clerk* from the commencement of the service in the transaction of the business of the attorney's office.

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2. ————: *See* BANKRUPTCY ACT, 1861.

BANKRUPTCY ACT, 1861 (24 & 25 VICT. c. 134), s. 192—*Deed of Inspectorship—Inequality—Reasonable provisions—Release.*] A deed of inspection, under s. 192 of 24 & 25 Vict. c. 134, provided: 1. That the inspectors should from time to time pay a dividend to the creditors, and should retain a sufficient sum for the purpose of paying a rateable dividend to any creditor who should not have executed the deed, and should pay such dividend to such creditor upon his request in writing. 2. That it should be lawful for the inspectors to authorize or require the debtor to enter into or undertake any new contract in the way of his trade or business, which the inspectors might think likely for the benefit of the creditors. 3. That if any creditor should, whilst the deed was in force, commence any action against the debtor, the deed should have the same force as an order of discharge in bankruptcy, and should accordingly be pleadable in bar. And the creditors covenanted that when the inspectors should, in writing, certify that the liquidation provided by the deed had, as far as possible, been concluded, or that the debtor had made a conveyance of his estate and effects, according to his covenant in that behalf, then such certificate should be conclusive evidence of the facts therein certified, and upon the giving of such certificate the debtor should be absolutely released from all his debts:—*Held*, 1. On the authority of *Hernuliwicz* v. *Jay* (6 B. & S. 697; 34 L. J. (Q.B.) 201); that there was no inequality between the assenting and non-assenting creditors. 2. That the deed being one of inspection, for the winding up of the estate, it might be necessary to enter into new contracts, and the deed was therefore not beyond the scope of the section; and on the authority of *Re Richmond Hill Hotel Company* (Law Rep. 4 Eq. 566), the Court would not decide as to the reasonableness of arrangements assented to by a majority of creditors. 3. On the authority of *Corner* v. *Sweet* (Law

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Rep. 1 C. P. 456), that the deed was pleadable in bar as a defence to the action.

BAILEY AND OTHERS *v.* BOWEN 133

2. BANKRUPTCY ACT, 1861 (24 & 25 VICT. c. 134), s. 198—*Sheriff —Escape—Certificate of Registration of Composition Deed.*] A debtor executed and registered a deed under s. 192 of the Bankruptcy Act, 1861, and was subsequently arrested upon a ca. sa. on a judgment recovered in respect of a cause of action which first accrued after the execution and registration of the deed. The debtor produced to the officer who arrested him the certificate of the registration of the deed, and was thereupon discharged from custody. In an action by the creditor against the sheriff for an escape:—*Held*, on demurrer, that the production of the certificate did not justify the sheriff under s. 198 in releasing the debtor.

DIGNAM *v.* BAILY 178

3. ———————————————, s. 192—*Deed of Arrangement and Distribution—Priority of Payment—Inequality.*] By a deed of January, 1867, for the arrangement and distribution of a debtor's estate, after reciting that by a deed of December, 1865, the debtor's creditors had granted him a letter of licence to carry on his business of a colliery proprietor under the direction of inspectors, and that the inspectors might retain or require payment out of the estate of all costs, charges, and expenses in anywise relating thereto, and might raise any sum of money by way of mortgage of the colliery, and apply the money (amongst other things) in paying the costs, charges, and expenses incurred in carrying on the business and in raising the money, the debtor assigned his estate to a trustee to get in and realize the same, and after payment of the costs of the arrangement of 1865, and all costs, charges, and expenses thereinbefore recited or referred to as having been incurred by the inspectors or with their sanction for the benefit of the debtor's estate, to pay the residue rateably amongst the debtor's creditors:—*Held*, by the Court of Queen's Bench, and by the Exchequer Chamber, that the provision for the payment of the costs incidental to carrying on the business, and all expenses incurred under the deed of 1865, in priority to the debts of the other creditors, did not render the deed of 1867 invalid: for that they were all reasonable provisions, and such as the creditors at large ought themselves to have assented to.

FITZPATRICK *v.* BOURNE .. .. 233 (Ex. Ch.)

4. ———————————————, *Composition Deed, Inequality of Covenant direct with assenting Creditors, and through a Trustee with others.*] By a deed under s. 192 of the Bankruptcy Act, 1861, it was agreed that a composition should be accepted by the creditors of 7*s.* 6*d.* in the pound, in full satisfaction of their respective debts, the composition to be payable by three equal instalments at four, eight, and twelve months from the registration of the deed, the payment to be secured by promissory notes of the debtor and a surety; and there was a covenant by the debtor with the creditors executing the deed to give them promissory notes accordingly, and a similar covenant with a trustee on behalf of the non-executing creditors; and in consideration of the premises the creditors covenanted not to sue for their original debt, this provision to be pleadable in bar as a release if they did; provided that if the promissory notes should not be duly tendered to any creditor, the provision as to not suing should be void as against such creditor:—*Held*, that the deed was neither unequal nor illusory, but was valid under s. 192.

SOWRY *v.* LAW 281

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5. BANKRUPTCY ACT, 1861 (24 & 25 Vict. c. 134), s. 192—*Composition Deed—Alteration in Deed after Registration.*] A deed under s. 192 of the Bankruptcy Act, 1861, was expressed to be made between the debtor and certain persons named in the schedule as creditors, and all other the creditors of the defendant, and was executed by a majority in number, representing three-fourths in value of the debtor's creditors, and was then registered; after registration, the names of two additional creditors of the debtor were inserted in the schedule:—*Held*, that there was no material alteration of the deed, and, that as the requisite number had assented before registration, the insertion of the names of the two creditors after registration did not affect the validity of the deed.
Wood *v.* Slack 379

6. ———, *Deed of Arrangement—Personal Covenant by Creditors to indemnify Trustees.*] By a deed-purporting to be within s. 192 of the Bankruptcy Act, 1861, traders assigned all their estate and effects to trustees, for the benefit of all the creditors, with power to the trustees to call in and compound all debts, to sell all or any of the stock, works, &c., and in the mean time to carry on the business of the debtors for such period as they should think fit; and there was a clause that "the trustees should be indemnified out of the estate of the debtors, or otherwise by the creditors, in proportion to the amount of their respective debts, against and in respect of all transactions and personal engagements, matters, and things whatsoever, which they shall lawfully do or cause to be done, or enter into or order or direct in and concerning the management or conduct of the business":—*Held*, that, as this clause imposed a personal liability on the non-assenting creditors beyond the loss of their debts, it was ultra vires, and the deed was not within s. 192.
Wigfield and Others, *v.* Nicholson 450

7. ———, *Deed of Arrangement between Debtors in Partnership and the Joint Creditors only.*] A deed of composition made between the members of a partnership and the joint creditors of the firm without any reference to the separate creditors of the different members of the firm, is not within s. 192 of the Bankruptcy Act, 1861; and is invalid against non-assenting joint creditors.
Tomlin and Others *v.* Dutton and Miller 466

8. ———, *Composition Deed, Proof of—Evidence.*] A creditor may assent in writing to a composition deed, under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), before the deed is prepared or executed by the debtor; and if the assent be to a deed of composition only, it will be sufficient, although the deed, when prepared, also contains a release. A memorandum written on the face of the deed, according to s. 196, stating the day and the hour of the day on which the deed was brought to the office of the chief registrar for registration, and that it was duly registered pursuant to the provisions of the Bankruptcy Act, 1861, is primâ facie evidence that an affidavit, pursuant to clause 5 of s. 192, was delivered to the chief registrar, together with the deed; and it is unnecessary to prove the truth of the affidavit.
Waddington *v.* Roberts 579

9. ———, ss. 197, 198—*Composition Deed—Protection of, where not pleaded.*] A debtor, who had executed and registered a deed of composition under s. 192 of the

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Bankruptcy Act, 1861, containing a release, was sued by a non-assenting creditor for a debt due before the execution of the deed. The debtor neglected to plead the deed, and the creditor obtained judgment, and issued execution:—*Held*, that, as the debtor might have pleaded the deed, he was estopped from setting it up afterwards to defeat the execution under s. 198.
Rossi *v.* Bailey 621

10. BANKRUPTCY ACT, 1861, effect of, on liability of shareholder .. 306
See Company. 2.

BASTARDY ORDER—*Absence of putative Father abroad—7 & 8 Vict. c. 101, s. 3.*] By s. 3 of 7 & 8 Vict. c. 101, on proof that the summons in bastardy was left at the last place of abode of the person summoned six days at least before the sessions, jurisdiction is given to the justices to hear the mother's evidence, and, if satisfied with the corroborative evidence, to adjudge the man to be the putative father of the child; and therefore the order of affiliation is valid, although at the time it was made the man was in a foreign country, without notice of the proceedings.
The Queen *v.* Damarell 50

BEER, sale of 8
See Beer Act.

BEER ACT (3 & 4 Vict. c. 61), s. 13—"*Selling Beer to be Consumed on the Premises.*"] The defendant was a person licensed to sell beer not to be drunk on the premises; his servant handed beer in a mug of the defendant's, through an open window of the defendant's premises, to a person who, after paying for it, drank it immediately, standing on the highway as close as possible to the window:—*Held*, that this evidence did not justify a conviction of the defendant under 3 & 4 Vict. c. 61, s. 13, for "selling beer to be consumed on the premises where sold."
Deal, Appellant; Schofield, Respondent 8

BILL OF EXCHANGE—*Indorsee against Acceptor—Contract of Acceptor of English Bill—English Bill indorsed abroad—Lex loci contractûs—Conflict of Laws.*] On a bill of exchange payable to order, drawn, accepted, and payable, in England, the contract of the acceptor is to pay to an order valid by the law of England; and an indorsee can maintain an action in England against the acceptor, under an indorsement valid by the law of England, although the indorsement was made in France, and by the law of France gave no right to the indorsee to sue in his own name, and although the indorser (who was also drawer and payee) and the indorsee were, at the time the bill was made and indorsed, subjects of France and domiciled and resident in that country. *Quære*, what were the rights of the indorsee against the indorser, either in England or France.
Lebel and Another *v.* Tucker 77

2. ——————, *Form—Foreign Bill, when to be stamped*—17 & 18 *Vict. c. 83, ss. 3, 5—Money had and received—Promise to pay on Transfer of Debt.*] In an action for money had and received, the following evidence was given. J. was indebted to the plaintiffs, and was also a creditor of the S. & F. Company, Limited, which was being wound up, and the defendant was the official liquidator. J. signed the following document: "Isle of Man, July 15, 1865. On 1st of August next, please to pay to Messrs. (the plaintiffs), or order 600*l.*, on account of moneys advanced by me to the S. & F. Company, Limited. To Mr. (the defendant), official liquidator of the said

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company." This document, which was unstamped when produced at the trial, was sent by J. to the plaintiffs in England, and they forwarded a copy to the defendant, who was also in England, requesting to know whether he would honour the order, and he replied he would when funds came into his hands about the 15th of August. Funds did come into his hands soon after that time, but owing to a dispute as to the amount remaining due to J. nothing was then paid; and after much correspondence, in which the plaintiffs continually demanded payment of the order, but never parted with it, this action was brought:—*Held*, first, that the order, on the face of it, was not an order to pay out of a particular fund, but a bill of exchange; but, being drawn in the Isle of Man, it was a foreign bill for stamp purposes, and therefore need not be stamped except as required by 17 & 18 Vict. c. 83, ss. 3 and 5, viz. when "presented for payment, indorsed, transferred, or otherwise negotiated in the United Kingdom;" that it had not been dealt with in any of these ways, and was therefore admissible in evidence without a stamp. Secondly, that the evidence shewed a contract binding on the defendant, within the principle of the decision in *Walker* v. *Rostron* (9 M. & W. 411.)

GRIFFIN AND OTHERS *v.* WEATHERBY AND HENSHAW 753

3. BILL OF EXCHANGE, alteration of 573
See PROMISSORY NOTE.

BILL OF SALE—*Construction*—"*Default*" *in payment*—*Parol evidence contradicting Deed*—*Giving time.*] By indenture of the 15th of May, 1865, goods of the plaintiff (called the mortgagor) were assigned to the defendants (called the mortgagees), subject to the proviso of redemption, that is to say, that these presents are on the express condition, that if the mortgagor repay to the mortgagees the sum of 62*l.* by instalments of 2*l.* on Monday, the 22nd instant, and on each of the succeeding Mondays until the whole is fully paid, the bargain and sale shall be void to all intents and purposes; provided also, that if the mortgagor shall make default in payment of the said 62*l.*, or any part thereof, when and as the same shall become due and payable, the whole shall then be immediately due and payable, and it shall be lawful for the mortgagees to take possession of the goods, and sell and dispose of them as they think fit. There was also a proviso that the mortgagees, as long as any of the 62*l.* remained due or unpaid, might enter at any time and take temporary possession of the goods. The previous instalments having been paid, on Monday, the 28th of August, 1865, the plaintiff's wife asked the defendants' manager to wait till the 11th of September, when she would pay 6*l.*, to which he assented. On the 5th of September the manager wrote saying he should take immediate possession of the goods. On the 7th he took possession of the goods, and left a man in possession. On the same day the plaintiff's wife applied at the defendants' office, and was told to bring 40*l.* on the next Saturday, the 9th, which would cover all claims, and she should have the bill of sale given up; on the Saturday the money was tendered, but she was told as there was no one there authorized to receive it to come again on the Monday before two. On the Monday, the 11th, she tendered the money in due time, but it was refused, and the goods had in the meantime been removed from the plaintiff's house and were afterwards sold. The above facts having been proved, in an action brought to recover damages for the seizure and sale of the goods:—*Held*, that the parol evidence was admissible, and shewed that there had been no "default" within the meaning of the deed; and that the plaintiff was therefore entitled to recover the value of the goods.

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2. BILL OF SALE—*Description of Residence and Occupation of Attesting Witness in affidavit under* 17 & 18 *Vict. c.* 36, *s.* 1.] In the affidavit filed with a bill of sale under 17 & 18 Vict. c. 36, s. 1, the attesting witness, William Knight Moston, stated, "I reside at Hanley, in the county of Stafford, and am an accountant." Moston was clerk to a Mr. Hayes, an accountant, who lived at Manchester, and Moston managed the business for him at Hanley, Moston being allowed by Hayes occasionally to do accountant's business on his own account; the name of Hayes and not Moston was over the door of the place of business. The parliamentary borough of Hanley contains a population of 40,000 persons. Hundreds of letters had reached Moston by the post with the address of Hanley only:—*Held*, that the affidavit contained a sufficient description of the residence and occupation of the attesting witness under 17 & 18 Vict. c. 36, s. 1.
Briggs *v.* Boss 268

BILLS OF SALE ACT, s. 1, affidavit under 268
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BOARD OF HEALTH, power of, to apply parts only of the Public Health Act, 1848, to a district 723
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BOROUGH, MUNICIPAL, qualification of town councillor 130
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See Poor-rate. 1.

BURGESS ROLL is conclusive as to the persons entitled to vote .. 704
See Municipal Corporation. 5.

BURIAL ACTS (20 & 21 Vict. c. 81, s. 23; 22 Vict. c. 1, s. 1)—*Order in Council as to Burial Ground—Burial Ground unused at the time—Invalid Order no protection.*] The 20 & 21 Vict. c. 81, s. 23, enacts that it shall be lawful for the Queen in council, from time to time, to order such acts to be done by and under the directions of the churchwardens, or such other person as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health:—*Held*, that the section applies, and the authority of the Queen in council can be exercised, only where an existing burial ground is under the care of churchwardens, or other persons who have the charge of it, for the purpose of the burial of the dead. From the year 1679 till 1844, land was held by a corporation, from time to time, under long leases as a burial ground, and afterwards from year to year, till 1855. No burials took place after 1844, and in 1854 an order in council, under 15 & 16 Vict. c. 85, s. 2, was made that burials should be discontinued. In 1857, the freeholder demised the ground for ninety-nine years to S., who entered and put some rubbish on the land; in 1859, S. demised to the plaintiff for fifty years, and he entered on the land. In the same year, an order in council was made under 20 & 21 Vict. c. 81, s. 23, directed to "the person having the care of the burial ground," and served on the plaintiff, to do certain acts. The plaintiff disregarded the order, and thereupon the Secretary of State made an order, under 22 Vict. c. 1, s. 1, on the churchwardens of the parish in which the ground was situate, to do the acts: the churchwardens having entered in pursuance of the order:—*Held*, that the sections did not apply, and that the orders were invalid, and the churchwardens therefore liable as trespassers.
Foster *v.* Dodd and Another .. .. (Ex. Ch.) 67

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See BURIAL ACTS.

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CERTIORARI, costs after removal of indictment into Queen's Bench by 216
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CESTUI QUE TRUST, notice to quit by, in possession is good 567
See LANDLORD AND TENANT. 2.

CHARTERPARTY—*Construction—"Detention by Ice not to be reckoned as Laying Days."*] A charterparty provided that the ship should proceed to Sulina, or outside, in sufficient depth of water to load the ship, and there load from the agents of the merchants a complete cargo of grain. The cargo to be brought and taken from alongside the ship at the ports of loading and discharge at charterer's expense and risk. Thirty running days to be allowed (if the ship be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the laying days, at 6*l.* a day; *detention by ice and quarantine not to be reckoned as laying days.* There are no storehouses at the port of Sulina itself; but the grain shipped at Sulina is kept at places higher up the Danube, and is brought by steam lighters down the river and unloaded direct into ships waiting their lading at Sulina. The ship being ready to load, notice was given to the charterer; but after six days, before any cargo had been supplied, the river immediately above Sulina became frozen up, and so remained for two months, the port of Sulina itself remaining open. The ship having been thus delayed waiting for cargo:—*Held*, that this was a "detention by ice," within the meaning of the charterparty; that though the circumstances of the port were unknown to the shipowner, yet being well known in the grain trade, they must be taken to have been the basis of the contract; and that whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship, the exception in the charterparty would apply.
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See HUSBAND AND WIFE. 1.

CHURCHYARD—*Right to Herbage in Churchyard—Perpetual Curate—Lay Rector.*] An impropriate rectory, after its surrender to the Crown on the dissolution of monasteries, was granted by Queen Elizabeth to lay impropriators. Up to 1826 the impropriators appointed a curate with a yearly stipend of 31*l.* 10*s.*; in that year the curacy was augmented out of Queen Anne's Bounty, and the then lay impropriator charged the rectory, glebe land, tithes, &c., with the yearly rent-charge of 31*l.* 10*s.*, payable to the curate for the time being; the curacy then became a perpetual benefice by force of the 1 Geo. 1, st. 2, c. 10. The plaintiff was duly nominated, licensed, and instituted to the benefice in 1852. From the time of the grant of Elizabeth the lay impropriators had had exclusive possession of all the tithes and glebe lands; and during living memory these lands had

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been let to tenants together with the right of depasturing the churchyard with sheep, and the tenants had exercised this right without interruption till 1866, when the plaintiff gave the defendant, the present tenant, notice not to trespass, and then brought an action. On a case stating the above facts, the Court having power to draw inferences of fact:—*Held*, that the action was not maintainable; for that though the plaintiff had possession of the churchyard for spiritual purposes, it was not such a possession as excluded the lay impropriator (or his tenants) in whom the soil and herbage was still vested.
GREENSLADE *v.* DARBY 421

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COLLIERY, VENTILATION OF—23 & 24 VICT. c. 151, s. 10, r. 1.] By 23 & 24 Vict. c. 151, s. 10, rule 1, of the general rules to be observed in every colliery or coal mine and ironstone mine, by the owner or agent thereof, "an adequate amount of ventilation shall be constantly produced in all coal-mines, &c., to dilute and render harmless noxious gases to such an extent that the working places and the travelling roads to or from such working places shall, under ordinary circumstances, be in a fit state for working and passing therein":—*Held*, that it was not sufficient compliance with this rule to cause ventilation to pass along the working places and travelling roads, but that so much of the mine must be kept so ventilated as to render the working places and travelling roads safe.
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See COMPANY. 2.

3. ——————————, s. 153 689
See COMPANY. 4.

COMPANY—*Scire facias against Shareholder*—8 *Vict. c.* 16, *s.* 36—*Payment to another Creditor—Practice—Execution without scire facias—Costs.*] A rule nisi having been obtained by a judgment creditor of a company against a shareholder for a scire facias, under 8 Vict. c. 16, s. 36, on the application of the shareholder the Court made the rule

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absolute for execution without a scire facias. It is sufficient answer to such rule, that since the rule was obtained the shareholder has bonâ fide paid the full amount due on his shares to another creditor of the company who had obtained a scire facias against him; and it is not necessary that execution should have issued; and the Court discharged the rule without costs. A creditor of a company obtained several rules at the same time against different shareholders, and before cause was shewn he obtained satisfaction of his judgment by payment from some of the shareholders; the Court thereupon discharged the rule against the other shareholder without costs.

BURKE *v.* THE DUBLIN TRUNK CONNECTING RAILWAY COMPANY. MILLER'S CASE. KERNAGHAN *v.* THE SAME COMPANY. JAMES'S CASE. MARLEY'S CASE 47

2. COMPANY—*Liability of Bankrupt Shareholder to pay subsequent Calls —Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 75—*Bankruptcy Act*, 1861 (24 *&* 25 *Vict. c.* 134), *s.* 154.] A shareholder in a company under the Companies Act, 1862, who has become bankrupt and received his discharge, but retains his shares, is not discharged from liability to pay subsequent calls, whether made while the company is in operation or when it is being wound up: for the covenant of the shareholder on becoming a member under s. 16 to pay the calls on his shares is not "a contract to pay sums of money yearly, or otherwise," within s. 154 of the Bankruptcy Act, 1861, so as to make the present value of their liability proveable under that section; and s. 75 of the Companies Act, 1862, which makes it "lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls," only applies where the bankruptcy of the contributory is contemporaneous with the winding up of the company.

MARTIN'S PATENT ANCHOR COMPANY, LIMITED, *v.* MORTON. THE SAME *v.* HEWETT 306

3. ————, *Liability of Joint Stock Company issuing a Certificate of Shares under a Forged Transfer—Estoppel—Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 25, 35.] T. being the registered holder of five shares in a registered joint stock company, limited, left the share certificates in the hands of her broker. A transfer of the shares to S. and G. purporting to be executed by T., together with the certificates, was left with the secretary for registration. The secretary in the usual course wrote to T., notifying that the transfer had been so left, and, receiving no answer after ten days, registered the transfer, and removed the name of T., and placed the names of S. and G. on the register as holders of the five shares, giving them certificates certifying that they were the registered holders of the five specific shares. A. bargained for five shares through brokers in the usual way on the Stock Exchange, and paid the value of five shares, and the specific five shares were transferred to him by S. and G., and the name of A. was registered as the holder of the shares, and share certificates were given to him. It was afterwards discovered that the transfer to S. and G. was a forgery, and the company was ordered to restore T.'s name to the register by rule of court under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35. On a case stated under that section:—*Held*, that the giving of the certificate by the company to S. and G. amounted to a statement by the company, intended by the company to be acted upon by purchasers of shares in the market, that S. and G. were entitled to the shares, and that A. having acted upon that statement, the company were estopped from denying its truth. That A. was therefore entitled to recover from the company as damages for the loss of the shares, the value of the shares at the time the company first

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refused to recognize him as a shareholder, with interest at 4 per cent. from that time.

IN THE MATTER OF THE BAHIA AND SAN FRANCISCO RAILWAY COMPANY, LIMITED, AND AMELIA TRITTIN, RICHARD BURTON, AND MARY ANNE GOODBURN 584

4. COMPANY—*Contract for Sale of Shares pending Winding up—Transfer of Shares after Winding-up Order—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 153.] Section 153 of the Companies Act, 1862,—which enacts that, when a company is being wound up subject to the supervision of the Court, . . . every transfer of shares, made between the commencement of the winding up and the order for winding up shall, unless the Court otherwise orders, be void,—does not invalidate a contract for the sale of shares made in the interval, nor prevent a transfer being made after the order for winding up. Declaration, first and fourth counts, that a joint-stock company, limited, under the Companies Act, 1862, had been ordered on the 17th of March to be wound up under the supervision of the Court of Chancery, on a petition presented on the 7th of March; that after the commencement of the winding up the plaintiff agreed to sell and the defendant to buy certain shares in the company, the defendant to pay or indemnify the plaintiff from all calls thereafter to be made whilst the defendant should be entitled to the shares; breach, that the defendant had not paid nor indemnified the plaintiff against a subsequent call. Fifth count, that after the company had been ordered to be wound up, the plaintiff and defendant, on the 5th of April, upon the terms agreed between them that the defendant should indemnify the plaintiff in respect of the shares, executed a deed of transfer by which the plaintiff sold and transferred and the defendant agreed to accept the shares, subject to the conditions on which the plaintiff then held them; breach, that a subsequent call had been made on the plaintiff which the defendant had not repaid the plaintiff. The defendant pleaded, to the first and fourth counts, that the plaintiff did not execute a transfer of the shares to the defendant. To all the counts, that at the time of the making of the agreement and deed the plaintiff knew of the petition and of the commencement of the winding up, but the defendant was ignorant of them; that no sanction of the official liquidator or order of the court as to the sale or transfer of the shares had been obtained; that at the time of the making of the agreement and deed the plaintiff was not a member of the company, nor registered as such, of which the defendant was ignorant; that the defendant had not been registered or made a member of the company, and there had been no default on the part of the company in omitting his name from the register; and that the defendant never made any express agreement to pay or indemnify the plaintiff against any calls made upon the shares. On demurrer to the pleas:—*Held*, that the pleas were bad, and the counts good.

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THE QUEEN ON THE PROSECUTION OF THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY, *v.* THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY 170

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COPYRIGHT—*International Copyright Act* (7 *Vict. c.* 12), *s.* 6, *Author or Composer—Arrangement for the Pianoforte of Score of an Opera.*] By the International Copyright Act, 7 Vict., c. 12, s. 6, no author, or his assigns, of any musical composition first published in a foreign country, shall be entitled to the benefit of the act, unless, within the time mentioned in the order of council applying to that country, the musical composition shall have been registered with the following particulars: inter alia, name and place of abode of the author or composer. N. composed and published an opera in full score at Berlin, and after his death B. arranged the score of the whole opera for the pianoforte; in registering this arrangement in England, N.'s name was inserted as composer:—*Held*, affirming the judgment of the Queen's Bench, that the arrangement for the pianoforte was an independent musical composition, of which B., not N., was the composer; and the entry made under s. 6 was invalid, and gave no title to the assignee of the registered composition.
WOOD *v.* BOOSEY AND ANOTHER .. .. .. (Ex. Ch.) 223

2. ————, *Works of the Fine Arts—25 & 26 Vict. c.* 68, *ss.* 4, 6—*Entry of Memorandum of Copyright—Description of the Nature and Subject of the Work—Conviction—Penalty.*] By 25 & 26 Vict. c. 68, s. 4, the proprietor of copyright in paintings, drawings, and photographs, shall enter in a memorandum of the copyright, amongst other things, "a short description of the nature and subject of the work." By s. 6, if any person, not being the proprietor for the time being, of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, or knowing that such repetition, copy, or other imitation, has been unlawfully made, shall sell . . . any copy . . . of the work, or of the design thereof, . . . such person, for every such offence, shall forfeit a sum not exceeding 10*l.* G., being the proprietor of the copyright in two paintings in oil, and in a photograph, entered them under s. 4 thus:—"Painting in oil, 'Ordered on Foreign Ser-

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vice;' painting in oil, 'My First Sermon;' photograph, 'My Second Sermon.'" The first picture represented an officer taking leave of a lady; the second, a young child sitting in a pew apparently listening with her eyes wide open; the photograph represented the same child asleep in a pew. B. sold, on two several days, in two parcels, twenty-six photographic copies of these works, knowing them to have been unlawfully made. These copies had been made from engravings of the pictures, in which engravings G. also had the copyright. B. was convicted under s. 6 in a penalty for each copy sold:—*Held*, that the nature and subject of the works were sufficiently described under s. 4; that to sell photographic copies of the engravings of a painting in which a person had a copyright, was an offence under s. 6; and that B. was properly convicted in a penalty in respect of each copy sold.
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COSTS—*County Courts Act*, 1867 (30 & 31 *Vict. c.* 142)—*Verdict recovered before passing of the Act—Power to grant Order under repealed acts*, 13 & 14 *Vict. c.* 61, *s.* 11, 15 & 16 *Vict. c.* 54, *s.* 4—*Statute of Gloster*, 6 *Ed.* 1, *c.* 1.] The plaintiff, in an action of trespass, obtained a verdict under 5*l.* on the 12th of August, 1867, and was then entitled to a judgment with no costs, by reason of 13 & 14 Vict. c. 61, s. 11, unless he obtained a certificate or order, but, as title came in question, the plaintiff was entitled to obtain an order for costs, under 15 & 16 Vict. c. 54, s. 4, on the ground that no plaint could have been entered in the county court, but he did not obtain such an order, nor had he signed judgment on the 1st of January, 1868. On that day the 30 & 31 Vict. c. 142 (which received the royal assent the 20th of August, 1867) came into operation, and by it the above sections were repealed. The plaintiff then claimed costs:—*Held*, that the plaintiff, having under the then existing statutes become entitled to a judgment for the sum recovered, and no costs, unless he got an order, the transaction was complete, and the subsequent repeal of the statutes could not operate to give him a right to a different judgment. Secondly, that, as the section authorizing the Court to make the order giving costs was repealed, the Court had no power now to make the order. *Restall* v. *London and South Western Railway Company* (Law Rep. 3 Ex. 141), dissented from; *Morgan* v. *Thorne* (7 M. & W. 400), followed.
BUTCHER *v.* HENDERSON 335

2. ———, *Ground for allowing Costs under County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 5—*Practice.*] Where the plaintiff recovers in a superior court a sum not exceeding 20*l.* in an action of contract, or not exceeding 10*l.* in tort, the distance at which the plaintiff resides from the defendant is not to be considered as any ground for the exercise

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of the discretion to allow costs given to the court or judge by the County Courts Act, 1867, s. 5.
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9. ——— of appeal under Salmon Fishery Act, 1865 699
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COUNTY COURT—*Practice—Notice of Appeal—Security for Costs—* 13 *&* 14 *Vict.* c. 61, *s.* 14—*County Court Rules of* 1857, *r.* 134.] By 13 & 14 Vict. c. 61, s. 14, on appeal from the county court, the party appealing shall, within ten days after the determination appealed against, give notice of appeal to the other party, and also give security to be approved by the registrar for the costs of the appeal. By County Court Rule 134, where a party proposes to give a bond by way of security, he shall give to the opposite party and the registrar notice of the proposed sureties, and the registrar shall fix a day for the bond to be executed, and for the other party to make any objection he may have to the sureties. An interpleader summons in a county court having been determined against the claimant on the 16th of November, he, on the same day, gave notice of appeal, and tendered a bond with sureties to the registrar; on the 19th of November he gave notice of the proposed sureties to the plaintiff. The plaintiff requiring further information as to the sufficiency of the sureties, and the claimant having been unable to obtain a definite answer from the plaintiff as to whether or no he objected to the sureties, the registrar, on the 17th of January, fixed the 21st of January for the execution of the bond, and gave notice to the plaintiff to make his objection, if any, on that day. The plaintiff did not appear, and the bond was then executed with the original sureties:—*Held*, that although the security had not been completed until after the ten days, yet as the appellant had done all he could to perfect it within that time, and the delay was caused by the plaintiff, the appellant had complied with the requirements of s. 14 and rule 134, and was entitled to have his appeal heard.
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2. ———————, *Jurisdiction in Ejectment — "Rent payable" in County Court Act*, 1867 (30 *&* 31 *Vict.* c. 142), *s.* 11—*Prohibition.*] By the County Court Act, 1867, s. 11, "all actions of ejectment, where

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neither the value of the tenements nor the rent payable in respect thereof shall exceed 20*l.* by the year, may be brought in the county court of the district in which the tenements are situate." A lessor having brought ejectment for a forfeiture:—*Held*, that "the rent payable," meant the rent payable as between the litigant parties, and not any rent that might be paid by a sub-lessee; and that the latter rent, if above 20*l.*, though it would be strong evidence of value, was not conclusive against the jurisdiction of the county court.

Held, also, the county court judge having decided on conflicting evidence that the value of the premises did not exceed 20*l.*, that the Court could not review his decision by prohibition, though on a point going to his jurisdiction only.

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5. ——————: *See* COUNTY COURTS ACT, 1867.

COUNTY COURTS ACT, 1867 (30 & 31 VICT. c. 142), s. 10—*Giving Security for Costs in an action of Tort—Retrospective Enactment.*] By 30 & 31 Vict. c. 142, s. 10, it shall be lawful for any person against whom an action of tort may be brought in a superior court, to make affidavit that the plaintiff has no visible means of paying costs, and thereupon a judge of the court shall have power to make an order that, unless the plaintiff within a time named give security for costs to the satisfaction of a master, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed, or the cause be remitted for trial before a county court to be named:—*Held*, on the authority of *Wright* v. *Hale* (6 H. & N. 227; 30 L. J. (Ex.) 40), that the section was to be construed as retrospective, and applied to an action commenced before the passing of the statute.

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3. ——————————, s. 10, practice under 469
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4. ——————————: *See* COUNTY COURT.

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CRIMINAL LUNATIC—*Order for Costs of Maintenance when removed from Prison to Asylum under 3 & 4 Vict. c. 54, ss. 1, 2—When Order may be made—Retrospective Order—Jurisdiction of County Justices in Borough—Construction of 11 & 12 Vict. c. 42, s. 6; 11 & 12 Vict. c. 43, ss. 6, 35, with 26 & 27 Vict. c. 77, as to Poor Law and Lunatic Orders.*] H. L. having been convicted of felony at the Wilts Lent Assizes, 1864, and sentenced to twelve months imprisonment, was accordingly imprisoned in the county gaol, situate in the borough of Devizes, which has its own exclusive jurisdiction. While undergoing his sentence he became insane, and by an order of the secretary of state, under 3 & 4 Vict. c. 54, s. 1, he was removed to a licensed asylum in another county, on the 25th of June, 1864. On the 28th of March, 1867, two justices of Wilts, sitting in the borough of Devizes, and purporting to act under s. 2, after adjudging the settlement of H. L. to be in the parish of B. in the B. union, ordered the guardians of the union to pay to the keeper of the gaol the reasonable charges of the inquiry into the insanity of H. L., and of his removal to the asylum, and to pay to the keeper of the asylum 114*l.*, being the aggregate amount of the weekly charges for his maintenance in the asylum from the 25th of June, 1864, to the 24th of March, 1867; and a further weekly sum of 16*s.* from the latter date:—*Held*, first, that the order was not invalid by reason of its having been made after the expiration of the term of the lunatic's imprisonment. Secondly, that the justices for the county had jurisdiction to make the order (though relating to a lunatic) while sitting in the borough, by reason of 11 & 12 Vict. c. 42, and 11 & 12 Vict. c. 43, s. 6, coupled with 26 & 27 Vict. c. 77, which so far rendered nugatory the exceptions in 11 & 12 Vict. c. 43, s. 35. Thirdly, by Cockburn, C.J., and Lush, J. (Blackburn, J., doubting), that the order was bad as to the 114*l.*, as there was nothing in 3 & 4 Vict. c. 54, s. 2, enabling the justices to make such a retrospective order. By Mellor, J., that the justices had power under s. 2 to make an order for past maintenance, but that the order ought to be quashed on the ground that it ought to have been applied for before.

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EVIDENCE—*Inspection of Documents*—14 & 15 *Vict. c.* 99, *s.* 6—17 & 18 *Vict. c.* 125, *s.* 50.] To an action by executors to recover damages for the death of the testator, caused, as alleged, by the negligence of the defendants, a railway company, the defendants pleaded not guilty, and that the deceased had accepted 75*l.* in discharge of all claims connected with the accident from which it was alleged the death had afterwards resulted. The defendants had sent a clerk in their secretary's office and their medical officer to see the deceased, and ascertain his state, and to negotiate as to the pecuniary compensation to be made to

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him. The Court ordered the plaintiffs inspection and copies of the reports made to the defendants by these officers of their interviews with the deceased.
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FACTORY ACTS (7 VICT. c. 15), s. 22—*Accident in a Factory preventing return to work—Duty of Occupier to report.*] By 7 Vict. c. 15, s. 22, if any accident occur in a factory which shall cause bodily injury to any person employed therein of such a nature as to prevent him from returning to his work in the factory before nine o'clock the following morning, the occupier of the factory shall, within twenty-four hours of such absence, send notice thereof in writing to the certifying surgeon of the district:—*Held*, that any accident taking place in a factory, whether caused by the machinery or not, must be reported; and that if the person injured returns the next morning with the intention of temporarily working, but without the ability to continue at his ordinary work, he is "prevented from returning to his work" within the meaning of the section; and the occupier of the factory is bound to send notice to the surgeon.
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HIGHWAY—*Conviction for riding or driving over Footpath—Highway Act* (5 *&* 6 *Wm.* 4, *c.* 50), *s.* 72.] Section 72 of the Highway Act, 5 & 6 Wm. 4, c. 50, imposes a penalty on any person, "who shall wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot-passengers, or shall wilfully drive any horse, &c., cattle or carriage, upon any such footpath or causeway":—*Held*, that the enactment applies only to footpaths (as well as causeways) by the side of roads, and not to footways in general.
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2. ———, *Indictment for non-repair—Costs of Prosecution*—5 *&* 6 *Wm.* 4, *c.* 50, *s*, 95—*Certiorari*—5 *W. & M. c.* 11, *ss.* 2, 3.] Where an indictment, ordered by justices, under 5 & 6 Wm. 4, c. 50, s. 95, to be preferred at the next assizes against the inhabitants of a township, is removed by the defendants by certiorari into the Court of Queen's Bench, and is tried at nisi prius, and a verdict is found for the defendants, the presiding judge has no power, under the above section, to order the payment of the costs of the prosecution out of the highway rate: the section giving the power only to the judge of assize, that is, the judge sitting under the commission of oyer and terminer. *Reg.* v. *Eardisland* (3 E. & B. 960; 23 L. J. (M. C.) 145), dissented from.
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3. ———, 27 *&* 28 *Vict. c.* 101, *s.* 25—"*Cattle found lying about any highway.*"] Under 27 & 28 Vict. c. 101, s. 25, the owner is liable to a penalty if cattle, sheep, &c., are found lying about any highway, notwithstanding they are under the control of a keeper at the time.
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HUSBAND AND WIFE—*Chose in Action of Wife—Evidence—Admissibility against a Party to a suit of Examined Copy of Answers to Interrogatories made by him in a former Suit.*] The defendant

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received money from a third person to be appropriated to the use of a married woman, and he wrote telling her he held the money at her disposal. The husband survived the wife, and died, never having at any time interfered in any way as to the money:—*Held*, that the wife's representative, and not the husband's, was the proper party to sue for the money; as the facts shewed a chose in action conferred on the wife with which the husband had not interfered during coverture. An examined copy of answers to interrogatories made in a former suit by one of the parties to an action is admissible in evidence against him, without putting in the interrogatories to which they are answers, or proving the party's signature to the original answers.
FLEET, ADMINISTRATRIX OF MARY ANN ROSS, *v.* PERRINS .. 536

2. HUSBAND AND WIFE—*Parent and Child—Liability of Father for Necessaries supplied to Child by order of Wife*—2 & 3 *Vict. c.* 54, *s.* 1.] The plaintiff, on the order of the defendant's wife, supplied clothes for the defendant's child; the wife was living separate from him for reasons which justified her doing so, and the child, which was under seven years of age, was living with her, against the defendant's will, an order of the Master of the Rolls having been made, under 2 & 3 Vict. c. 54, giving the wife the custody. The wife had no means adequate to support her according to her husband's degree:—*Held*, by Blackburn, Mellor, and Lush, JJ. (Cockburn, C.J., dissenting), that as the child was by law properly in the care of the wife, the reasonable expenses of providing for it were part of the reasonable expenses of the wife, for which she had authority to pledge her husband's credit.
BAZELEY *v.* FORDER 559

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See COPYRIGHT. 1.

INTERROGATORIES—*Inquiry by the Defendants as to the amount of Damages—Practice.*] In an action claiming 20,000*l.* damages for the breach of an agreement to deliver certain bills of exchange of a company, as to which the defendants had paid one shilling into court, the Court allowed interrogatories to be exhibited to the plaintiff as to the solvency of the company and the amount of damages which he had sustained by the non-delivery of the bills.
DOBSON *v.* RICHARDSON AND OTHERS 778

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JURISDICTION OF COUNTY COURT in salvage cases 439
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JURISDICTION OF JUSTICES, in issuing warrant of distress for rates 262
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2. ——————————, where misdemeanour by a governor of a colony 487
See JUSTICES. 2.

3. ——————————, county, in borough 604
See CRIMINAL LUNATIC.

4. ——————————, of petty sessional division 718
See SPECIAL CONSTABLE.

JUSTICES—*Jurisdiction—Proceedings to enforce Rate by Warrant of Distress—Limitation of Time for making "complaint" by* 11 *&* 12 *Vict. c.* 43, *s.* 11—"*Exercise of summary jurisdiction*" *within* 20 *&* 21 *Vict. c.* 43.] By a local act for a borough, in case any person assessed to a rate under it should refuse or neglect to pay the rate for ten days next after demand, it was lawful for a justice of the borough, by warrant under his hand and seal, to authorize the collector to levy the rate by distress and sale of the goods of the person in default, or of the goods found on the premises; no time was fixed within which proceedings to enforce the rate were to be taken. By 11 & 12 Vict. c. 43, s. 11, in all cases where no time is specially limited for making "such complaint," it shall be made within six calendar months from the time when the matter of such complaint arose:—*Held*, that "such complaint" referred to complaints mentioned in s. 8, viz., complaints "upon which a justice may make an order for the payment of money or otherwise," and that s. 11, therefore, did not apply to proceedings for enforcing a rate by the mere issuing of a warrant of distress. *Quære*, whether these proceedings were "the exercise of summary

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jurisdiction by justices" within 20 & 21 Vict. c. 43, so as to enable them to state a case under that statute.
SWEETMAN, Appellant; GUEST, Respondent 262

2. JUSTICES—*Jurisdiction—Crime committed beyond the Seas—"Next court of oyer and terminer"—Misdemeanour by Governor of a Colony—11 & 12 Wm. 3, c. 12; 42 Geo. 3, c. 85—11 & 12 Vict. c. 42, ss. 2, 17, 20, 25.*] By 11 & 12 Wm. 3, c. 12, and 42 Geo. 3, c. 85, if any governor of a colony, or other person holding or having held public employment out of Great Britain, has been guilty of any crime or misdemeanour in the exercise of his office, every such crime, &c., may be prosecuted or inquired of, and heard and determined, in the Court of King's Bench in England, either upon information by the Attorney-General, or upon indictment found, and such crime, &c., may be laid to have been committed in Middlesex:—*Held*, that an offence under the above statutes was "an offence committed on land beyond the seas, for which an indictment might legally be preferred in any place in England," within 11 & 12 Vict. c. 42, s. 2, and that that section and the other enactments of that statute, as to preliminary examination, &c., before a magistrate in whose jurisdiction the accused might be, applied to charges under the above statutes, and that the Court of Queen's Bench is included in the term "next court of oyer and terminer" in s. 20.
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LANDLORD AND TENANT—*Husband and Wife—Indenture of Lease by Husband and Wife, without Acknowledgment, binding on Lessee.*] Husband and wife seised in fee in right of the wife, in April, 1860, by indenture demised land to C. for seven years, and the lessee and the defendants, as his sureties, covenanted to pay the rent during the term. The deed was executed by all the parties, but the wife did not acknowledge it under 3 & 4 Wm. 4, c. 74, s. 79, nor was the deed in conformity with 19 & 20 Vict. c. 120, s. 32. The lessee entered immediately, and occupied till August, 1866, when he left England. The husband died in January, 1866; and the wife died in January, 1867, having interfered in no way with the property. The executors of the wife brought an action on the covenant against the defendants to recover rent which accrued due in June, 1866:—*Held*, that the covenant bound the defendants, inasmuch as the lessors had executed the deed, so as to pass the term for which the lessee and the defendants must be taken to have contracted and to which the covenant was annexed, viz., a term for seven years, terminable at the option of the wife on the husband dying during the term; and that as the wife had done nothing to avoid the lease, but allowed the lessee to retain possession, the lease was subsisting up to her death, and the plaintiffs could therefore recover.
TOLER AND OTHERS *v.* SLATER AND ANOTHER 42

2. ——————, *Notice to Quit—Notice by Agent—Notice by Cestui que Trust in his own Name.*] The trustees of G.'s marriage settlement purchased in October, 1863, a farm partly with trust money, G. supplying the rest. At the time of the purchase the defendant held the farm as yearly tenant to the vendor. From the

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time of the purchase the trustees left the entire management and control of the farm to G., and he had had with their consent the entire management of all the other settled estates for twenty-six years. G. negotiated with the defendant as to the terms on which the tenancy should continue, dealing as if he were the owner of the farm, without mentioning trustees. The defendant not agreeing to the terms, in January, 1864, G., in his own name as landlord, gave him notice to quit at the end of the year. In March and August, 1864, receipts for rent were given to the defendant in the name of the trustees. The defendant disputed the validity of the notice, and would not quit at the end of the year, on which ejectment was brought, the trustees not knowing till then that G. had given the notice to quit. The Court having power to draw inferences of fact:—*Held*, that the inference to be drawn was that the notice was with the sanction of the trustees, as it was incident to such an authority as the trustees had delegated to G. that he should determine the tenancy at any time he might think proper; and that it was not necessary to the validity of a notice given by such a general agent that his agency should appear on the face of the document; that the notice was therefore valid. *Doe* v. *Goldwin* (2 Q. B. 143), noticed.

JONES AND OTHERS *v.* PHIPPS 567

3. LANDLORD AND TENANT—*Effect of Mortgage not executed by Mortgagee with Attornment by Mortgagor as Tenant—Estoppel—Construction of Mortgage Deed.*] B., being mortgagor in possession, executed a mortgage on the 12th of September, 1866, of the premises to the defendants to secure the repayment with interest of certain advances by the defendants. The mortgage was by indenture between B. and the defendants, but was never executed by the defendants; the deed recited the previous mortgage (which was in fee), and by it B. conveyed all the premises comprised in the recited mortgage to the defendants, in fee, upon trust that the defendants should, either immediately or at any time, sell them, "and as a further security for the principal and interest for the time being due from B. to the defendants, B. did thereby attorn and become tenant to the defendants, their heirs and assigns, as and from the date thereof, of such of the premises thereby conveyed as were in his occupation for and during the term of ten years, if that security should so long continue, at the yearly rent of 800*l.*, to be paid on the 1st of October, the first yearly rent to be payable on the 1st of October then next. Provided that, notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators, or assigns, before or after the execution of the trusts of sale, to enter upon the said mortgaged premises, or any part thereof, and to eject B., or any person claiming through him, and to determine the said term of ten years, notwithstanding any lease that might have been granted by B." B. continued accordingly in occupation of the premises; and on the 15th of October, 1866, the defendants distrained for the first year's rent:—*Held*, that the intention of the parties, as evidenced by the deed, was to create a tenancy at will only, and not a term of ten years; that a deed being therefore unnecessary, the tenancy was created by the assent of the parties and the occupation under it, and that the fact that the defendants had not executed the deed was immaterial. Secondly, that, the parties having agreed that the relation of landlord and tenant should be established between them, the mortgagor was estopped from setting up that the defendants had no legal reversion; and that it made no difference that the fact of the mortgagor having only the equity of redemption appeared on the face of the deed; and that the distress was therefore valid.

MORTON AND OTHERS *v.* WOODS AND OTHERS 658

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4. LANDLORD AND TENANT—*Covenants running with Land—Covenant not to assign without Licence—Covenant to repair and renew Tenant's Fixtures—Damages, Measure of.*] A covenant, in an indenture of lease by which the lessees, for themselves, their heirs, executors, administrators, and assigns, covenanted that they, their executors, administrators, and assigns, would not assign, underlet, or otherwise part with the possession of the demised premises without first obtaining the consent in writing of the lessor, is a covenant which touches and concerns the land, and therefore runs with the land, and the lessor can sue an assignee of the lessee for the breach of it. The measure of damages in an action for a breach of the covenant is such a sum as will, as far as money can, put the plaintiff in the same position as if he had still the defendant's liability, instead of the liability of another of inferior pecuniary ability, for breaches both past and future. Similar covenants to keep in repair the buildings, and to repair, renew, and replace tenant's fixtures and machinery fixed to the premises, run with the land, and bind the assignee; but not similar covenants as to mere utensils or moveable chattels used in the business carried on in the demised premises and being there at the time of the demise.
WILLIAMS *v.* EARLE 739

LANDS CLAUSES CONSOLIDATION ACT, 1845 (8 VICT. c. 18)—*Inquiry as to Compensation—Taxation of Costs by Master under s.* 52 *—Jurisdiction of Court of Queen's Bench to review.*] Where costs of an inquiry before the sheriff are "settled by one of the masters of the Court of Queen's Bench," under s. 52 of the Lands Clauses Consolidation Act, 1845, the Court has no jurisdiction over the master's taxation on a motion to review. *Quære*, whether, if the master improperly allow costs to one of the parties where he is not entitled to them, or disallow them where the party is entitled to them, the Court can interfere by certiorari or mandamus.
IN THE MATTER OF AN INQUIRY BETWEEN EDWIN OWEN AND THE LONDON AND NORTH WESTERN RAILWAY COMPANY 54

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LEAD MINE, rateability of watercourse connected with 478
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2. ——, covenant in, not to assign without licence runs with the land .. 739
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LEX LOCI CONTRACTUS, operation of 77
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LIBEL, what is an obscene 360
See OBSCENE LIBEL.

LIMITATION of time for instituting summary proceedings under ss. 257 and 525 of the Merchant Shipping Act, 1854 208
See MERCHANT SHIPPING ACT, 1854.

LOCAL BOARD OF HEALTH—*Local Government Act*, 1858 (21 & 22 *Vict.* c. 98), *s.* 34—*Validity of Bye-law as to Privies and Ashpits.*] Section 34 of the Local Government Act, 1858, enables a local board of health to make bye-laws "with respect to the drainage of buildings, to waterclosets, privies, ashpits, and cesspools, in connection with buildings":—*Held*, that the section did not empower the making of a

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bye-law, that "no dwelling house shall be erected without having, at the rear or side thereof, a good and sufficient back street or roadway, at least twelve feet wide, communicating with some adjoining public street or highway, for the purpose of affording access to the privy or ashpit of such house."
WAITE, Appellant; THE LOCAL BOARD OF HEALTH OF GARSTON, Respondents 5

LOCAL GOVERNMENT ACT, 1858, s. 34, powers of Local Board of Health under 5
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LOCOMOTIVE STEAM ENGINES, liability of company for damage done by fire from 733
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LONDON, CHATHAM, AND DOVER RAILWAY (ARRANGEMENT) ACT, s. 4, construction of 170
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LUNATIC, order of settlement of pauper 383
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2. ———, CRIMINAL, order for costs of maintenance of, when removed from prison 604
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LUNATIC ORDERS: *See* CRIMINAL LUNATIC.

MARKET TOLL, prescriptive right to 521
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MARRIAGE FEE, proof of, by prescription 497
See PRESCRIPTION. 1.

MARRIED WOMAN, lease by, not acknowledged under 3 & 4 Wm. 4, c. 74, s. 79 42
See LANDLORD AND TENANT. 1.

MASTER AND SERVANT—*Parent and Child—Action for Seduction—Evidence of Service.*] The plaintiff's daughter, being under age, left his house and went into service. After nearly a month the master dismissed her at a day's notice, and the next day, on her way home to her father's house, the defendant seduced her:—*Held*, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of the father to her services revived, and there was therefore sufficient evidence of service to maintain an action for the seduction.
TERRY *v.* HUTCHINSON 599

MEASURE OF DAMAGES—*Consequential Damage—Action for Assault—Railway Company.*] The plaintiff was travelling with other passengers in a carriage of a railway company, and on the tickets being collected there was found to be a ticket short. The plaintiff was charged by the collector with being the defaulter, and on his refusing to pay the fare or leave the carriage, he was removed from the carriage by the officers of the company without any unnecessary violence. It turned out that the plaintiff had a ticket. And he brought an action for the assault against the company, laying as special damage the loss of a pair of race-glasses, which he had left behind him in the carriage when he was removed. There was also a count in trover; but there was no evidence that the glasses had come

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to the possession of any of the company's servants:—*Held*, that the plaintiff could not recover for the loss of the glasses.

GLOVER *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY 25

2. MEASURE OF DAMAGES—*Non-delivery of Chattel—Contract of Sale.*] Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, the buyer can recover, as damages for the non-delivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount. The defendants agreed to sell and deliver to the plaintiffs within a certain time the hull of a floating boom derrick; but they did not deliver it till six months after the specified time. The plaintiffs, who were large coal merchants in the port of London, purchased the hull in order to place in it, as they in fact did, large hydraulic cranes and machinery for the purpose of transhipping their coals direct from colliers into barges. The hull was the first vessel of the kind ever built, and the plaintiffs' special purpose was entirely novel, and was unknown to the defendants. The defendants believed that the plaintiffs were purchasing the hull for the purpose of using her as a coal store. If the plaintiffs had been prevented using the hull for their special purpose, they would either have sold her to be used, in the hulk trade, as a coal store, or, if unable to do so, would have used her themselves as a store, and this was the most obvious use to which such a vessel was capable of being applied by persons in the coal trade: but the hulk trade is a distinct branch of the coal trade, and was no part of the plaintiffs' business. Had the hull been purchased for this purpose, the delay in the delivery would have occasioned loss to the amount of 420*l.* The plaintiffs actually suffered damage to a much larger amount from not having the hull ready for their special purpose at the time fixed for the delivery:—*Held*, that the plaintiffs were entitled to the 420*l.* as the damages to which the defendants must be taken to have contemplated would result from the non-performance of their contract.

CORY AND OTHERS *v.* THE THAMES IRONWORKS AND SHIP-BUILDING COMPANY, LIMITED 181

3. ——————————, *Non-delivery of Goods under Contract of Sale—Forbearance of Buyer at Seller's request—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17.] The defendant by bought and sold notes contracted to sell to the plaintiff 500 tons of iron, delivery to extend to the 25th of July. Owing to an accident to his furnaces, the defendant delivered none of the iron by that date, nor up to the February following, when the plaintiff went into the market; and the price having risen since July, he sought to recover from the defendant, as damages for his breach of the contract of sale, the difference between the contract price and the market price in February. At the trial, correspondence was put in which had passed from August to February between the plaintiff, the defendant, and the brokers who had acted for both parties, and were still acting for the plaintiff; from this correspondence it appeared that the defendant repudiated his liability on the ground that the non-delivery was owing to inevitable accident, but he proposed that the plaintiff should take iron of a different quality; this, after consideration, the plaintiff declined; further negotiation ensued, and on the 29th of December the brokers wrote to the defendant that the persons who had contracts for his iron yet undelivered were pressing them extremely, and threatened to purchase against the defendant; adding, "when our Mr. T. was with you, he was informed that it might take three months to put the furnaces in

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repair, and we informed all our friends to this effect, and they have waited considerably over that time. . . When do you think we may promise deliveries?" The defendant simply acknowledged the letter, and said he could not say what it was intended to do with the furnaces. The jury having returned a verdict for the full amount claimed:—*Held*, that there was evidence from which the jury might infer that the plaintiff's delay was at the defendant's request; that, as the evidence went to shew, not a new contract, but simply a forbearance by the plaintiff at the request of the defendant, the Statute of Frauds did not apply; and that the plaintiff was entitled to a verdict for the full measure of damages.

OGLE *v.* EARL VANE .. .. (Ex. Ch.) 272

4. MEASURE OF DAMAGES—*Vendor and Purchaser—Sale of Real Estate—Breach of Contract.*] The defendants, mortgagees of the lease of a house, sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The plaintiff re-sold at an advance of 105*l.* to G., who wanted the house for occupation. On investigation, the title was satisfactory, but, on the plaintiff requiring possession before completing the purchase, it appeared that the mortgagor was in possession and refused to give it up. The defendants were in a position to oust him by ejectment, but they refused to complete the sale on the ground of expense. On this the plaintiff brought an action on the contract of sale:—*Held*, that as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to their contract, the plaintiff could recover, not only the deposit and the expenses of investigating the title, but also damages for the loss of his bargain; and that the measure of damages was the profit which it was shewn he could have made on a re-sale. *Flureau* v. *Thornhill* (2 W. Bl. 1078), and the subsequent cases discussed.

ENGEL *v.* FITCH AND OTHERS 314

5. ——————— on breach of implied warranty of quality on sale of goods 197
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6. ——————— in action for breach of covenant not to assign without licence 739
See LANDLORD AND TENANT. 4.

MEASURES AND WEIGHTS 433
See WEIGHTS AND MEASURES.

MERCHANT SHIPPING ACT, 1854 (17 & 18 VICT. c. 104), ss. 257, 525—*Attempt to persuade Seamen to neglect to join Ship—Limitation of Time of instituting summary proceedings.*] The Merchant Shipping Act, 1854, s. 257, makes it an offence to persuade or attempt to persuade any seaman to neglect or refuse to join, or to desert from his ship; by s. 525 no conviction for any offence shall be made under this act in any summary proceeding, unless such proceeding is commenced within six months after the commission of the offence; or if both or either of the parties to such proceeding happen during such time to be out of the United Kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same:—*Held*, that "parties to the proceeding" meant the seaman and the person persuading or attempting to persuade; and that if either of them leaves the kingdom during the six months after the commission of the offence an information may be laid within two months of his return:—*Held* also, that the offence might be committed

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although the formalities, required by s. 150, in the engagement of the seaman, had not been complied with.
AUSTIN, Appellant; OLSEN, Respondent 208

MERCHANT SHIPPING ACTS, 1854 and 1862, recovery of salvage under 439
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MESNE PROCESS, arrest for 18
See SHERIFF. 1.

METROPOLIS MANAGEMENT ACTS (18 & 19 VICT. c. 120), ss. 105, 250; (25 & 26 *Vict. c.* 102), *s.* 77—*Paving New Streets—Liability of Church* —"*Owner.*"] A church, built on land conveyed to the commissioners for building additional churches, is not liable to be assessed to the expenses of forming a new street, either as "house," or "land," under the Metropolis Management Acts. *Semble*, that the commissioners were not "owners" within the statutes.
ANGELL, Appellant, *v.* THE VESTRY OF PADDINGTON, Respondents 714

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MONEY HAD AND RECEIVED, evidence in action for 753
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MORTGAGE, estoppel by 658
See LANDLORD AND TENANT. 3.

MUNICIPAL CORPORATION—*Qualification of Person nominating Candidate for Town Councillor—22 Vict. c.* 35, *s.* 6.] Under s. 6 of 22 Vict. c. 35, where a municipal borough is divided into wards, the person nominating a candidate for town councillor must be entitled to vote for the particular ward for which he nominates, and if he be entitled to vote only for another ward his nomination and the election of the candidate are void.
THE QUEEN *v.* PARKINSON 11

2. ——————, *Qualification of Town Councillor—"Entitled to be on the Burgess List"—5 & 6 Wm. 4, c.* 76, *s.* 28.] Section 28 of 5 & 6 Wm. 4, c. 76, disqualifies any person from being eligible as a town councillor of a borough "who shall not be entitled to be on the burgess list of such borough." P. was elected in August, 1867, a town councillor; he was then, in fact, on the burgess roll which came into operation on the 1st of November, 1866, but he was not, when put on it, duly qualified to be on the burgess roll. In November, 1867, on a motion for a quo warranto information against P., on the ground that he was disqualified as town councillor, not being "entitled to be on the burgess list," the Court refused a rule.
EX PARTE HINDMARCH 12

3. ——————, *Town Councillor—Burgess—Receipt of Parochial Relief—5 & 6 Wm.* 4, *c.* 76, *ss.* 9, 23.] Parochial relief given to a man's father is not relief to the man himself, within 5 & 6 Wm. 4, c. 76, s. 9, so as to disqualify him under that section as a burgess of a borough, and so under s. 23 as a town councillor.
THE QUEEN *v.* IRELAND 130

4. ——————, *Election of Town Councillor—Disqualification of Candidate—Knowledge by Elector of Disqualification.*] At the election of town councillors in a borough not divided into

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wards, there were four vacancies and five candidates. B., one of the four who had a majority of votes, was the mayor, and acted as returning officer, and was therefore incapable of being elected:—*Held*, that the mere knowledge on the part of the electors who voted for B. that he was mayor and returning officer, did not amount to knowledge that he was disqualified in point of law as a candidate; and therefore their votes were not thrown away, so as to make the election fall on the fifth candidate.

THE QUEEN *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF TEWKESBURY 629

5. MUNICIPAL CORPORATION—*Election of Town Councillor—Burgess Roll—Selection by Burgess of his Ward—Voting Paper—"Description" of Candidate—Quo warranto, Trial of—Rule of Court, Hilary Term, 1827—Municipal Corporation Act* (5 & 6 *Wm.* 4, c. 76), *ss.* 32, 44, 142.] To a quo warranto information for exercising the office of town councillor of a borough, the defendant pleaded that he was elected councillor by a majority of votes of the burgesses, on which a traverse was taken that he was not so elected:—*Held*, that the relator might, at the trial, go into the validity of other votes recorded for the defendant, besides those to which objection had been specially made on obtaining the rule for the quo warranto, and that he was not tied down by the rule of Hilary Term, 1827, to those specific objections only. The burgess roll, formed under ss. 15—22 of 5 & 6 Wm. 4, c. 76, is conclusive as to the persons entitled to vote, and the qualification of a voter on the roll cannot be questioned in a quo warranto against the person elected. By s. 32, at the election of councillors the voting paper shall contain the Christian names and surnames of the persons for whom the burgess votes, with their places of abode and descriptions. By s. 142 no inaccurate description of any person, body corporate, or place, named . . . in any roll list, notice, or voting paper required by this act, shall hinder the full operation of this act in respect to such person, &c., provided that the description of such person, &c., be such as to be commonly understood. A voting paper contained the Christian name and surname of the candidate and his place of abode, and nothing more:—*Held*, that this was not an inaccurate description, but a total omission of the description of the candidate, and was not cured by s. 142; and the vote was therefore invalid. By s. 44, if any burgess shall be rated in respect of distinct premises in two or more wards, he shall be entitled to be enrolled and to vote in such one of the wards as he shall select, and not in more than one. A burgess appeared on the roll both of the N. ward and S. ward, and voted in the S. ward:—*Held*, that not having been objected to at the revision court, he was not bound to select his ward before the election, and that his vote was valid.

THE QUEEN *v.* TUGWELL 704

6. ——————————, rateability of property of 474
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2. ——————, ss. 1 and 2 of 9 & 10 Vict. c. 93, do not create a fresh cause of action on the death of the person injured 555
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3. ——————, liability of railway company for damage done by fire without actual 733
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NUISANCES REMOVAL ACT, 1855 (18 & 19 VICT. c. 121), ss. 8, 12—"*Persons by whose act or default*" *&c., the nuisance arises.*] By 18 & 19 Vict. c. 121, s. 12: "Where a nuisance is ascertained by the local authority to exist, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, who shall proceed to inquire into the complaint; and if it be proved to their satisfaction that the nuisance exists, the justices shall make an order on such person, owner, or occupier for the abatement or discontinuance and prohibition of the nuisance." By s. 8, "Nuisance" includes any ditch or drain so foul as to be a nuisance or injurious to health, any accumulation or deposit which is a nuisance or injurious to health. B. drained his premises into a barrel drain, which also received the sewage of other premises; this drain passed for about 300 yards under a turnpike road, and thence the sewage was conveyed by an open drain through certain land not B.'s, and ultimately into an open drain about half a mile from B.'s premises, by the side of a road on land not B.'s; this open drain was a nuisance, the matter from B.'s premises, in itself, being sufficient to cause a nuisance. On complaint, the justices, under s. 12, ordered B. to abate the nuisance by cutting off all communication from his premises to the barrel drain. F. was the owner of six houses, let to tenants; he had constructed a drain from the houses under land not his own by leave of the owner, by which the sewage was conveyed into and along a watercourse, and the accumulation at the mouth of the drain was a nuisance. On complaint, the

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justices ordered F. to abate the nuisance :—*Held*, that the orders were rightly made upon B. and F., for that they were the persons by whose act respectively the nuisances arose. *Quære*, where several persons empty sewage into one place, and the aggregate becomes a nuisance, the amount contributed by each not being in itself sufficient to cause a nuisance, whether proceedings can be taken under s. 12 against any of such persons. In proceedings under this act, the question whether or not the persons against whom the proceedings are taken, have a legal right to cause their sewage to flow in the given channel, &c., is immaterial.

BROWN, Appellant; BUSSELL, Respondent. FRANCOMB, Appellant; FREEMAN, Respondent 251

OBSCENE LIBEL—*Misdemeanor—Seizure and Destruction of Obscene Articles, under* 20 *&* 21 *Vict. c.* 83, *s.* 1.] By 20 & 21 Vict. c. 83, s. 1, if upon complaint that there is reason to believe that any obscene books, &c. are kept in any house or other place, for the purpose of sale or distribution, and upon proof that one or more of such articles has been sold or distributed in connection with such place, justices may, upon being satisfied that such articles are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such, order by special warrant that such articles shall be seized, and after summoning the occupier of the house, the same or other justices may, if they are satisfied that the articles seized are of the character stated in the warrant, and have been kept for the purposes aforesaid, order them to be destroyed. A number of copies of a pamphlet entitled, "The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession," were seized in the appellant's house and ordered by justices of a borough to be destroyed as obscene books within the above section. On appeal, the following facts were found. The pamphlet consisted of extracts taken from the writings of theologians on the doctrine and discipline of the Romish Church and particularly on the practice of auricular confession. On one side of the page were passages in the original Latin, and opposite to each passage was a free translation in English. The pamphlet also contained a preface and notes condemnatory of the tenets and principles of the writers. About half of the pamphlet related to controversial questions, but the latter half of the pamphlet was grossly obscene, as relating to impure and filthy acts, words, and ideas. The appellant sold the pamphlets at the price he gave for them to any one who applied for them. He did not keep the pamphlets to sell for profit or gain, nor for the purpose of prejudicing good morals, though the indiscriminate sale and circulation of them was calculated to have that effect; but he kept and sold them for the purpose of exposing what he deemed to be the errors of the church of Rome, and particularly the immorality of the confessional. The recorder, being of opinion that the sale and distribution of the pamphlets under the above circumstances would not be a misdemeanor, quashed the order of justices :—*Held*, that the order of justices was right: for that the publication of such an obscene pamphlet was a misdemeanor, and was not justified or excused by the appellant's innocent motives or object; he must be taken to have intended the natural consequences of his act.

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3. —— to proceed in formâ pauperis takes effect from service 214
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5. —— for costs of maintenance of criminal lunatic when removed from prison 604
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6. —— for payment of special constables under 1 & 2 Wm. 4, c. 41, s. 13 718
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7. ——, BASTARDY: *See* BASTARDY ORDER.

"OWNER," meaning of word in Metropolis Management Acts 714
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PARENT AND CHILD, liability of husband for necessaries supplied to child by order of his wife, who has the custody of the child under 2 & 3 Vict. c. 54 559
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2. ——————, evidence of service in action for seduction .. 599
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PAROL EVIDENCE: *See* EVIDENCE.

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PAUPER LUNATIC—*Order of Settlement of—Right of Appeal—Parties—16 & 17 Vict. c.* 97, *s.* 108; 24 *&* 25 *Vict. c.* 55, *ss.* 6, 7.] By 16 & 17 Vict. c. 97, s. 108, if the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any order adjudging the settlement of any pauper in a lunatic asylum, they may appeal against it. By 24 & 25 Vict. c. 55, s. 6, the maintenance of a pauper lunatic in an asylum is to be borne by the common fund of the union; and by s. 7, the guardians of any union may obtain orders upon the guardians of any other union, or upon the guardians or overseers of any parish not comprised in a union, and may appeal against and defend any orders in respect of any lunatic paupers hereby made chargeable upon the common fund. . . . The guardians of M. Union obtained an order adjudging the settlement of a pauper in a lunatic asylum to be in the parish of A., in the F. Union, and the guardians of F. Union were ordered to pay the expenses of the removal of the lunatic and of his maintenance in the asylum. The overseers of the parish of A. appealed against the order:—*Held*, that ss. 6 and 7 of 24 & 25 Vict. c. 55, did not repeal s. 108 of 16 & 17 Vict. c. 97; and that the overseers of A. had a right of appeal against the order, as they might still be aggrieved by an order adjudging the settlement of a pauper to be in

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their parish, though his maintenance while in the lunatic asylum was thrown on the common fund of the union.
THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF THE PARISH OF ALDERSHOT, Appellants, *v.* THE GUARDIANS OF THE MEDWAY UNION, Respondents 383

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6. ———, order for, of special constable under 1 & 2 Wm. 4, c. 41, s. 13 718
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2. ——— under Copyright Acts 387
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PENALTY, APPLICATION OF—*Payment to Treasurer of County or Borough, under* 11 *&* 12 *Vict. c.* 43, *s.* 31.] By 11 & 12 Vict. c. 43, s. 31, when persons are convicted by justices under statutes which contain no directions for the payment of the penalties to any person, the penalties are to be paid to the clerk of the division for which the justices usually act, and he is to pay them over to the treasurer of the county, riding, ... city, borough, or place, for which such justices shall have acted; and a return is to be made by the clerk to the clerk of the peace for the county, borough, &c., in which the division is situate, when and as the court of quarter sessions for the same shall order. The municipal borough of R., in the county of S., has no separate commission of the peace, and no court of quarter sessions. The mayor and ex-mayor of R. have jurisdiction in R. as justices, and the justices of the county at large have concurrent jurisdiction. There is a treasurer for the borough:—*Held*, that the justices in and for the borough acted as county justices, with their powers limited to a particular locality; and the word "borough" in the above section meant a borough which has a court of quarter sessions; and therefore that penalties imposed by justices acting in and for the borough were to be paid to the treasurer of the county, and not to the treasurer of the borough.
THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF REIGATE *v.* HART 244

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PERSONAL SERVICE, order to proceed without, interpretation of .. 212
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PLEADING—*Plea puis darrein continuance—Plea of Payment after Action in satisfaction of the Debt, without mentioning Damages.*] Declaration, in the common form, for goods sold and delivered, claiming 120*l.* Pleas: 1. Never indebted. 2. "And for a further plea the defendant says," that the goods were sold under a warranty, that when delivered they did not correspond with the warranty, and thereupon, before suit, disputes arose between the plaintiffs and the defendant, in respect of the alleged breach of warranty; and after the commencement of the suit, and after the last pleading, it was agreed that the plaintiffs should accept from the defendant 60*l.* in settlement of the debt sought to be recovered in the action; and the defendant thereupon paid and the plaintiffs accepted 60*l.* in satisfaction and discharge of their said debt. On demurrer to the second plea:—*Held*, that the plea, being pleaded generally, must be taken to be pleaded to the whole causes of action; and as it alleged the payment after action to have been in satisfaction of the debt only, it was bad for leaving unanswered any damages to which the plaintiffs might be entitled.
ASH AND ANOTHER *v.* POUPPEVILLE 86

2. ————, *Plea of Composition Deed, and Refusal of Plaintiff to accept Composition, without payment into Court.*] To a declaration for goods sold and delivered, the defendants pleaded a deed of composition under the Bankruptcy Act, 1861, by which the defendants agreed to pay 10*s.* in the pound on all their debts, payable by instalments of 2*s.* 6*d.* at certain dates, and the creditors agreed to accept the composition in full satisfaction of their respective debts, and on payment of it to execute a release, and not to molest or sue the defendant for any claim, unless default should be made by the defendants in payment of the instalments; and it was argued that if any creditor should sue contrary to this clause, the deed might be pleaded in bar of the action. The plea then alleged that the defendants were ready to pay the first instalment, but the plaintiffs refused to accept the same, and exonerated the defendants from paying or tendering it, and wholly refused to consent to or approve of, or become parties to, the deed. On demurrer:—*Held*, that the plea was good without payment into court.
BAMFORD AND ANOTHER *v.* CLEWES AND ANOTHER 729

3. ————— justification in an action for slander 396
See SLANDER.

4. ————, effect of not, protection under Bankruptcy Act, 1861 .. 621
See BANKRUPTCY ACT, 1861. 9.

POOR LAW—*Settlement by paying public taxes of parish, under* 3 *W. & M., c.* 11, *s.* 6—*Landlord's property tax—*5 *& 6 Vict. c.* 35, *ss.* 60, 73, *Sch.* (*A*).] A tenant of premises, who has been assessed and paid the property tax under Sch. (A), and deducted it from the next rent paid to the landlord, acquires a settlement in the parish in which the premises are situate, under 3 W. & M., c. 11, s. 6. So held on the authority of cases decided under the land tax acts.
THE OVERSEERS OF ST. GEORGE, HANOVER SQUARE, Appellants; THE GUARDIANS OF THE CAMBRIDGE UNION, Respondents .. 1

POOR-RATE—*Rateable Occupation—Exemption of Buildings used for public purposes—*43 *Eliz. c.* 2, *s* 1.] Justices of a county were empowered, under a local act, to provide courts in the city of M. and other necessary accommodation for the holding of the business of the assizes; and they were further empowered to permit the use of such buildings for any lawful purpose, at such times, upon such conditions, and for such consideration as they might think proper, but not so as to interfere with the use of the buildings for the purposes of the assizes.

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The justices provided courts, &c., for the assizes, and provided in such courts, for the corporation of the city of M., for 900*l.* per annum (viz., 600*l.* for the use and 300*l.* for expenses), all the accommodation required for the city quarter sessions and the city court of record. The 600*l.* was applied by the justices in part payment of the annual expense of keeping up the courts, &c.:—*Held*, that the justices were rateable to the relief of the poor for their occupation of the courts, &c., in respect of the 600*l.* per annum; as to such extent they had a beneficial occupation within the principle established by the *Mersey Docks Cases* (11 H. L. C. 443; 35 L. J. (M. C.) 1).

THE JUSTICES OF LANCASHIRE, Appellants; THE OVERSEERS OF THE TOWNSHIP OF CHEETHAM, Respondents 14

2. POOR-RATE—*Exemption of the Crown—Tolls of Bridge in Occupation of Commissioners of Works and Buildings*—43 *Eliz. c.* 2, *s.* 1.] The Commissioners of Works and Buildings were incorporated under certain statutes, and empowered to construct a bridge at Chelsea, and to borrow from the Treasury 120,000*l.* on an assignment of the tolls. The commissioners were authorized to take tolls, which were to be applied in payment of the expenses of the bridge, then in repayment of the sum borrowed, and when that had been repaid there was to be no toll charged for foot passengers. There was no ultimate appropriation of any surplus:—*Held*, in the Court of Queen's Bench, and in the Exchequer Chamber, that the commissioners were not liable to be rated to the relief of the poor, as they were in occupation of the bridge as servants of the Crown, deriving themselves no benefit from the receipt of the tolls; and were therefore exempt from the operation of 43 Eliz. c. 2, s. 1, as explained in *Jones* v. *Mersey Docks* (11 H. L. C. 443; 35 L. J. (M.C.) 1).

THE QUEEN *v.* MCCANN AND ANOTHER .. 141 (Ex. Ch.) 677

3. ————, *Occupation—Moorings, Rateability of—Easement.*] The conservators of the Thames were owners of the soil and bed of the river, and of moorings fixed to the soil of the river. W. used the moorings to moor his hulk, as a floating coal depot, under the following document: "We, the conservators of the Thames, do grant to W. liberty and licence to fasten, and thenceforth keep fastened, his coal hulk to the moorings placed by the conservators in the river, until either party shall have given to the other one calendar month's notice in writing. In consideration whereof W. agrees to pay towards the expenses of placing and maintaining and repairing the moorings the annual sum of 30*l.*" W. was assessed to the poor-rate as occupier of part of the bed of the river:—*Held*, that the above document was not a demise, but only granted to W. a licence to use the moorings, and that he was therefore not the occupier, and not liable to be rated.

WATKINS, Appellant; THE OVERSEERS OF MILTON-NEXT-GRAVESEND, AND OTHERS, Respondents 350

4. ————, *Municipal Corporation — Non-rateability of Corporate Property under proviso in* 4 *&* 5 *Vict. c.* 48, *s.* 1.] By 4 & 5 Vict. c. 48, s. 1, it is enacted that the municipal corporations in schedules A and B of 5 & 6 Wm. 4, c. 76, shall be rateable in respect of their occupation of corporate property as if it were not corporate property; provided that where such property lies in any parish which is situate wholly within the limits of a borough named in the said schedules, and in which borough the poor are relieved by one entire poor-rate, the exemption of such property from rateability shall continue as if this act had not passed:—*Held*, that this was an affirmative enactment that property so situate should be exempt, and the exemption therefore continued, notwithstanding that the decisions which had

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originally created the exemption of corporate property were overruled by *Jones* v. *Mersey Docks* (11 H. L. C. 443; 35 L. J. (M. C.) 1). *Held*, also, that the Union Chargeability Act (28 & 29 Vict. c. 79) did not affect this exemption of corporate property in a parish in a union.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF THE TOWNSHIP OF OLDHAM AND OTHERS, Respondents; *v.* THE MAYOR AND CORPORATION OF THE BOROUGH OF OLDHAM, Appellants 474

5. POOR-RATE—*Rateability of Watercourse connected with Lead Mine*—43 *Eliz. c.* 2.] The appellants, for the purpose of working the machinery connected with a lead mine, diverted a stream from its natural course, paying the owners for such diversion, and paying certain small sums for the occupation of the land by the watercourse. The watercourse was about a mile and a half in length, being partly open, partly tunnelled, and for about 350 yards in pipes:—*Held*, that the appellants were rateable to the poor-rate in respect of the occupation of the watercourse at the value of the land enhanced by its capability of conveying water; and that it was not exempt from rateability by reason of its connection with a lead mine, though that is not rateable under the 43 Eliz. c. 2. *Rex.* v. *Bilston* (5 B. & C. 851), discussed.

THE TALARGOCH LEAD MINING COMPANY, Appellants; THE GUARDIANS OF ST. ASAPH UNION, Respondents 478

6. ——————, *Division of Parishes for Civil and Ecclesiastical Purposes.*] The district of Tranby has commonly been called a township or hamlet, but it has never maintained its own poor or highways separately, nor appointed a constable. It lies adjacent to Hessle and Kirk Ella, which are both ancient immemorial parishes, each having a church. Hessle consists, independently of the disputed district of Tranby, of the township of Anlaby and the township of Hessle. Anlaby maintains its own poor and highways separately, having its own overseers. The overseers of Hessle make poor-rates for the remainder of the parish of Hessle, which are commonly called rates for the township of Hessle. For the last hundred years, and for anything that appears to the contrary before that time, the lands in Tranby have been rated to the poor and highway rates of Hessle, and the overseers and surveyors of that part of Hessle parish have acted for Tranby as if it were part of their district. But the lands in Tranby, from the earliest period, have been titheable in Kirk Ella, as being situate in that parish; and the occupiers have been rated to the church rates in that parish; and as to all ecclesiastical matters, Tranby has uniformly and immemorially been treated and reputed as part of the parish of Kirk Ella:—*Held*, that the rating of Tranby to the poor-rates of Hessle must be supported, as it was impossible to say that the usage might not have had a legal origin.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF HESSLE AND OTHERS, Respondents; *v.* WATSON, Appellant 762

PRACTICE—*Interpretation of Order to proceed without personal service of Writ of Summons—Time, how to be computed—Common Law Procedure Act*, 1852 (15 *&* 16 *Vict. c.* 76), *ss.* 17, 29.] A judge's order, that "three days after the service of this order at defendant's residence, the plaintiff be at liberty to proceed as if personal service of the writ of summons had been effected on defendant," was served at the defendant's residence on the 20th of December, and no appearance having been entered by the defendant, the plaintiff signed judgment on the morning of the 23rd of December:—*Held*, that, under the

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order, the defendant had to the end of the 23rd to enter an appearance, and that the judgment ought not to have been signed till the 24th of December.

WEEKS *v.* WRAY 212

2. PRACTICE—*Order to proceed in formâ pauperis takes effect from service only.*] Judgment having been entered for the defendant, the plaintiff took proceedings in error, and then obtained an order to proceed in formâ pauperis; after judgment had been affirmed, she served a copy of the order on the defendant:—*Held*, that the defendant was entitled to his costs of the proceedings in error: for that the order only took effect from the date of the service.

FRAY *v.* VOULES 214

3. ———, *Summons against Foreigner residing without Jurisdiction—Cause of Action—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *ss.* 18, 19.] The defendant, a foreigner residing abroad, entered into a contract with the plaintiffs abroad to sell them a quantity of manganese, to be delivered at Newcastle-upon-Tyne. The defendant delivered part, but failed to deliver the rest. The plaintiffs issued a writ under ss. 18 and 19 of the Common Law Procedure Act, 1852, and after notice served upon the defendant abroad, applied to the Court to be at liberty to proceed against the defendant:—*Held*, that, as the whole cause of action did not arise within the jurisdiction of the superior courts, the plaintiffs were not entitled to proceed. *Sichel v. Borch* (2 H. & C. 954; 33 L. J. (Ex.) 179), followed.

ALLHUSEN AND ANOTHER *v.* MALGAREJO 340

4. ———, *County Court, Order for Trial in, under* 30 & 31 *Vict. c.* 142, *s.* 10—*Jurisdiction of a Judge of a different Court.*] By 30 & 31 Vict. c. 142, s. 10, in certain actions in the superior courts, the judge of the court in which the action is brought may make an order that the cause be tried in a county court, unless the plaintiff give security for costs to the satisfaction of a master, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court. A judge of one of the superior courts, sitting at chambers for all the courts, although not a judge of the particular court in which the action is brought, has jurisdiction to make an order under the above section. The order of the judge is open to review by the Court; and his decision is not final as to whether the plaintiff has a cause of action fit to be prosecuted in the superior court.

OWENS *v.* WOOSMAN. OWENS *v.* JONES 469

5. ——— as to right to begin on case stated under Salmon Fishery Act, 1865 30
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6. ——— on proceeding by scire facias against a shareholder .. 47
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7. ——— in pleading a plea puis darrein continuance 86
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8. ——— as to inspection of documents 91
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12. PRACTICE as to allowing costs under s. 5 of the County Courts Act, 1867 358
See COSTS. 2.

13. ——— on appeal from order of settlement of pauper lunatic .. 383
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14. ——— when a plaintiff has omitted to plead a protection under the Bankruptcy Act, 1861 621
See BANKRUPTCY ACT, 1861. 9.

15. ———: *See* INTERROGATORIES.

PRESCRIPTION — *Immemorial Custom — Marriage Fee — Rankness.*] From the year 1808 to 1854 the fee paid on the celebration of a marriage in a parish church was proved to have been almost uniformly 13*s.*, viz., 10*s.* to the rector and 3*s.* to the clerk. There was no evidence extending beyond 1809. The Court having power to draw inferences of fact:—*Held*, by Kelly, C.B., Martin and Channell, BB., that, considering the difference in the value of money in 1189 and the present time, of which the Court will take judicial notice, it was impossible that a payment of 13*s.* on every marriage could have been made at that period, and that the objection of rankness applied, and rebutted the presumption, arising from uninterrupted modern usage, that the fee was taken as of right in the time of Richard I. *Semble*, also, by the same judges, that a marriage fee must be a fixed fee, and cannot be of a varying amount; but that, if it were otherwise, the evidence would not support the claim to a merely reasonable or varying fee; and, *quære*, whether the sum of 13*s.* on every marriage in a small country parish is a reasonable fee at the present day. By Bramwell, B., and Byles, J., that the fee was not a reasonable fee at the present time; that it could not have been due as of right in the time of Richard I., and could have no immemorial legal existence. By Keating, J., that, as the fee claimed had been paid as far back as living memory went, and as a legal origin could be assigned to the payment, the presumption from this long-continued payment was, that it had an immemorial legal existence: unless rebutted by proof to the contrary, and that the large amount of the fee was not sufficient to rebut the presumption.
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3. ———, toll by 521
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4. ——— for fixed engines to catch salmon 639
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PRISON ACT, 1865, s. 24, notice under 457
See QUARTER SESSIONS.

"PROCEEDINGS," meaning of word 170
See CONSTRUCTION. 1.

PROMISSORY NOTE—*Immaterial Alteration by Payee.*] A promissory note expressed no time for payment, and while it was in the possession of the payee, the words "on demand" were added without the assent of the maker. In an action by the payee against the maker:—*Held*, that, as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument. The statement in the second resolution of *Pigot's Case* (11 Rep. 27a), "if the obligee himself alters the

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deed . . . although it is in words not material, yet the deed is void," dissented from.
ALDOUS *v.* CORNWELL 573

PROPERTY TAX, settlement gained by paying 1
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PROSECUTION, costs on, for non-repair of highway 216
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PROTECTION under Bankruptcy Act, 1861, effect of not pleading .. 621
See BANKRUPTCY ACT, 1861. 9.

PUBLIC BUILDINGS, exemption of, from poor-rate 14
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PUBLIC HEALTH ACT, 1848 (11 & 12 VICT. c. 63), s. 10—*Power of General Board of Health in applying parts of the Act to a district.*] By the Public Health Act, 1848 (11 & 12 Vict. c. 63, s. 10), if after inquiry it shall appear to the General Board of Health expedient that the Act, or *any part thereof*, ... should be put in force within any city, town, borough, or place, in which any Local Act is in force, for paving, lighting, &c., they shall make a provisional order accordingly, with such provisions, regulations, conditions, and restrictions, with respect to the application and execution of this Act, or any part thereof, and with respect to such Local Act and its repeal, alteration, extension, or further execution of the same, and in all respects whatsoever as they may think necessary under all the circumstances of the case. A Local Act was in force in the borough of T., and a provisional order was made under the above section; it was ordered that the Public Health Act, 1848, should apply and be in force throughout the borough, except s. 50, and so much of s. 88 as provides that the occupier of any land used as arable, meadow, or pasture ground only, &c., and the occupier of any land covered with water or used only as a canal or towing path, or as a railway constructed under any act of parliament for public conveyance, shall be assessed in one fourth only of the net rateable value; and the rating clauses of the Local Act were repealed, and others substituted, by which all hereditaments in a part of the district were to be rated upon two thirds of the rateable value. A railway company having been rated accordingly at two thirds in one part of the district and in the full rateable value in the rest of the district, in respect of their railway proper; on appeal:—*Held*, that such a severing of s. 88 was not within the powers given by s. 10 to the General Board of Health.
THE NORTH EASTERN RAILWAY COMPANY, Appellants; THE MAYOR, ALDERMEN, AND BURGESSES OF TYNEMOUTH, Respondents 723

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QUARTER SESSIONS—*Adjournment from a Sessions to the Sessions next but one—Prison Act*, 1865 (28 & 29 *Vict. c.* 126), *s.* 24, *Notice under.*] By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 24, the necessity for the alteration or enlargement of an existing prison shall be proved by the presentment of two or more visiting justices, and the consideration of such a presentment shall not be entertained unless not less than three weeks' notice has been given in some newspaper circulating in the district of the prison authority, of their intention to take the same into consideration at a time and place to be stated in the notice. Due notice having been given that the presentment of justices as to certain gaols would be taken into consideration at the April quarter sessions for the county of W., the presentment was taken into consideration at those sessions, and it was resolved, that the matter should be referred to a select committee, to inquire into it and report to the October sessions. At the October sessions, the report was taken into consideration without any fresh notice having been given, and an order was made in conformity with the report:—*Held*, that the power of adjournment was inherent in the Court of Quarter Sessions, and that it was competent to the court to adjourn the matter from the April to the October sessions; that they had in effect done so, though not formally; that a fresh notice for the October sessions was not necessary; and that the order was therefore valid.

THE QUEEN *v.* THE JUSTICES OF WESTMORELAND 457

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RAILWAY COMPANY—*Negligence—Fences, duty to repair—*8 *Vict. c.* 20, *s.* 68—*Carriers by Railway, Liability of beyond their own Line.*] The plaintiff was a passenger by the defendants' railway, to be carried from Y. to T. To reach T. it was necessary to travel over a line belonging to another company; while passing over the latter line, the train in which the plaintiff was came into collision with a bullock, which had strayed on to the line from an adjoining field by breaking through the fence. The fence was in fact defective, but had been lately repaired, and was apparently in good condition. The plaintiff being injured by the collision, sought to recover damages from the defendants:—*Held*, on the authority of *Great Western Railway Company* v. *Blake* (7 H & N. 987; 31 L. J. (Ex.) 346), that, the contract having been made with the defendants, they were the proper parties to be sued. *Held* also, that 8 Vict. c. 20, s. 68, imposes no duty on a railway company towards their passengers to keep up the fences; and that a railway company are not bound, at common law, to maintain fences sufficient to keep cattle off the line under all circumstances, but are bound to use every reasonable care to prevent them straying on to the line.

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2. ———————, *Negligence—Passenger, Death of—Accord and Satisfaction—Fresh cause of Action—*9 & 10 *Vict. c.* 93, *ss.* 1, 2.] Declaration by the plaintiff as widow of D. Read, under 9 & 10 Vict. c. 93, and 27 & 28 Vict. c. 95, against a railway company for negligence whereby D. Read, a passenger, was injured, of which injuries he died. Plea, that in the lifetime of D. Read, the defendants paid him, and

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he accepted, a sum of money in full satisfaction and discharge of all the claims and causes of action he had against the defendants. Demurrer, on the ground that the accord and satisfaction with D. Read was no accord and satisfaction of the claim arising from his death:—*Held*, that the cause of action was the defendants' negligence, which had been satisfied in the deceased's lifetime, and that the death of D. Read did not create a fresh cause of action.
READ *v.* THE GREAT EASTERN RAILWAY COMPANY 555

3. RAILWAY COMPANY—*Liability at Common Law for Damage done without Negligence by Fire from Locomotive Steam Engines.*] A company were empowered by act of parliament, passed in 1832, to make and maintain, and to do all matters fit or necessary for making and using a railway or tramroad for the passage of waggons, engines, and other carriages, for the purpose of conveying minerals, &c. The company having obtained the certificate of the Board of Trade, ran passenger trains drawn by locomotive steam engines, having taken all reasonable precautions to prevent the emission of sparks. The plaintiff's hay stack having been fired by sparks from one of the engines:—*Held*, that as the company had not express powers given them by statute to use locomotive steam engines, they were liable at common law for the damage, though negligence was negatived.
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SALE, contract for, of shares pending winding-up order 689
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SALE OF GOODS—*Implied Warranty that Goods shall be in a merchantable condition—Caveat emptor—Measure of Damages.*] Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description. The maxim, caveat emptor, does not apply to a sale of goods where the buyer has no opportunity of inspection. The plaintiffs, at Liverpool, entered into a contract with the defendant for the purchase of a quantity of Manilla hemp, to arrive from Singapore by certain ships. The ships arrived, and the hemp was delivered to the plaintiffs and paid for; on examination of the bales it was found that they had been wetted through with salt water, and afterwards unpacked and dried, and then repacked and shipped at Singapore. The hemp was not damaged to such an extent as to make it lose its character of hemp; but it was not "merchantable." The defendant did not know of the state in which the hemp had been shipped at Singapore. The plaintiffs sold the hemp by auction as "Manilla hemp with all faults," and it realized 75 per cent. of the price which similar hemp would have fetched if undamaged:—*Held*, that there was an implied warranty, on the part of the defendant, to supply Manilla hemp of the particular quality of which the bales consisted in a merchantable condition; and that the plaintiffs were entitled, as damages, to the difference between what the hemp was worth when it arrived and what the same hemp would have realised had it been shipped in a state in which it ought to have been shipped.
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SALMON FISHERY ACTS, 1861 (24 & 25 VICT. c. 109), ss. 4, 12—(28 & 29 *Vict.* c. 121), s. 42—"*Fishing Mill-dam*"—*Jurisdiction of Commissioners—Practice—Right to Begin.*] By s. 4 of the Salmon Fishery Act, 1861, "'fishing mill-dam' shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes":—*Held*, that a dam built solely for milling purposes, and without any contrivances for catching fish, is not a fishing mill-dam within this section, although it does in fact render it more easy to catch fish than would have been the case if there had been no dam, and although the owners of the dam have occasionally availed themselves of the facility so afforded for the purpose of catching fish; and such a dam, therefore, cannot be abated under s. 42 of the Salmon Fishery Act, 1865. Any person so catching fish is, however, liable to

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the penalties imposed by s. 12 of the Act, of 1861. In appeals on a case stated under the Salmon Fishery Act, 1865, the party who occupies the position of prosecutor has the right to begin.
GARNETT AND OTHERS, Appellants; BACKHOUSE, Respondent .. 30

2. SALMON FISHERY ACTS, 1861 (24 & 25 VICT. c. 109), ss. 12, 27—*Fishing Weir—Non-navigable river*—12 *Edw.* 4, *c.* 7—*Jurisdiction of Commissioners—Easement*—2 *&* 3 *Wm.* 4, *c.* 71.] The appellant is the owner of land lying on the right bank of the river Taw. The river runs from south to north, and is not navigable at the part in question. Opposite to the appellant's land there are, on his side, at a distance of about fifteen feet from the shore, two small islands belonging to the appellant, separated from each other by a narrow interval. At the southern or uppermost extremity of the two islands there has been from time immemorial between the island and the main land a fender, and lower down the stream certain wooden needles, shaped in the form of a V, with an opening in the lower end, such lower end being placed up the stream, through which salmon, on their passage up the river, make their way, and are then caught. This was the appellant's old fishing-weir. About sixty or seventy years ago, the two islands then forming only one, a predecessor of the appellant made an opening towards the lower part of the island, so that the one island was converted into two, and a portion of the stream was able to flow through the opening, and to pass between the lower island and the right bank of the stream. At this opening a fender was placed, which, like the old one, enabled the owner of the island to command the flow of water. The needles were then removed from their original position to a spot lower down the stream, between the second island and the main land. The weir thus altered had not, so far as its use as a fishing-weir was concerned, been interfered with by other riparian owners on either side of the river; but the use of the fender at the opening between the islands had been at times interrupted by the occupiers of the mill situate on the opposite bank. From the north-western extremity of the innermost of what are now the two islands, there has been from time immemorial a dam, extending diagonally across the stream to the mill, the effect of which, together with the mill, was to turn the body of the water to the mill. The effect of the new-made opening being to let a portion of the water escape, and so to interfere with the working of the mill; when the water was low the miller was accustomed to insist upon the new fender being put down, which was always acquiesced in by the appellant. Upon these facts the commissioners under the Salmon Fishery Acts made two orders: they held the old weir to be legal as having existed prior to the time of Edw. I, and ordered a fish-pass to be made in it according to the provisions of ss. 12 and 27 of 24 & 25 Vict. c. 109; they further held the more recent part of the existing weir to be illegal, and ordered its removal, on the assumption that by 12 Edw. 4, c. 7, no easement of a fishing-weir can have been legally acquired since the beginning of the reign of Edw. I. by a riparian owner in a non-navigable river:—*Held*, that the first order was bad: for that s. 12, which enacts that "no fishing-weir, although in use at the time of the passing of the act, shall be used for the purpose of catching salmon, unless it have therein such free gap as hereinafter mentioned," applies only to such weirs as come within s. 27, that is to fishing weirs "extending more than half-way across any stream at its lowest state of water," and that the fifteen feet of water flowing between the appellant's island and the main land was not a stream within the meaning of s. 27. *Held*, also, that the second order was bad: for that 12 Edw. 4, c. 7, relates to navigable rivers

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only, and that though weirs in navigable rivers are illegal unless they existed before the time of Edw. I, such an easement might be acquired in private waters by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted. *Held*, also, that the interruption to the use of the weir by the acts of the occupier of the mill did not prevent the appellant from acquiring the qualified easement under 2 & 3 Wm. 4, c. 71. *Held*, also, that, as it must have been the intention of the legislature to preserve existing rights, however acquired, the weir was within the reservation in s. 12 of 24 & 25 Vict. c. 109.

ROLLE, Appellant; WHYTE, Respondent 286

3. SALMON FISHERY ACTS, 1861 & 1865 (24 & 25 VICT. c. 109; 28 & 29 VICT. c. 121)—*Fixed Engines—Putchers—Stop-nets—Immemorial Usage*—2 *Hen.* 6, c. 15, *Interpretation of.*] By s. 11 of 24 & 25 Vict. c. 109, no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters . . . but the section shall not affect any ancient right or mode of fishing lawfully exercised, at the time of the passing of the act, by any person, by virtue of any grant, or charter, or immemorial usage. By the interpretation clause "fixed engine" includes "putchers;" and by s. 39 of 28 & 29 Vict. c. 121, "fixed engine" in the former act includes "any net fixed to the soil, or made stationary in any other way." The owner of a several fishery in the navigable and tidal river Severn claimed a right to use putchers and stop-nets (which it was admitted were fixed engines within s. 39 of 28 & 29 Vict. c. 121), for the purpose of catching salmon. The putchers and stop-nets had been in use for forty-five years up to 1862; there was no evidence of previous user, nor was there any evidence to the contrary. The commissioners having found the putchers and stop-nets illegal:—*Held*, that the user for forty-five years did not raise a conclusive presumption of law that the putchers and stop-nets had been used from time immemorial and were not of recent origin. *Held*, also, that the statute 2 Hen. 6, c. 15, prohibits not only the use of nets which are permanently fixed day and night, but also those which are fixed for intervals of time only, if they obstruct the navigation of a river and the passage of fish.

HOLFORD, Appellant; GEORGE, Respondent 639

4. ——————, 1865 (28 & 29 VICT. c. 121), ss. 33 & 36—*Putts, using of without licence—Penalty.*] Section 33 of the 28 & 29 Vict. c. 121, enacts that, "in any fishery district subject to the control of a board of conservators, licences shall be granted at fixed prices to all persons using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill-dams, putts, putchers, nets, or other instruments or devices, except rods and lines, whereby salmon are caught." Section 36 imposes a penalty not exceeding 20*l.* on "any person using any fishing weir, fishing mill-dam, putts, putcher, net, or other instrument or device, not being rod and line, for catching salmon without having a proper licence for the same." The appellant, who had no licence under s. 33, put down in a salmon fishery seventy putts, with circles in them, that is, wire gratings which could be removed at pleasure, and which, when in the putt, prevented salmon from entering, and alleged he laid down the putts for the purpose of catching shrimps and flat fish:—*Held*, that he was liable to a penalty, as it was made unlawful for any person to use putts in a salmon fishery for any purpose without a licence.

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superior courts to any person aggrieved by the decision of the commissioners, and the provisions of 20 & 21 Vict. c. 43, as to the powers of the Court are to apply, unless varied, to such appeal. The owner of a fishing weir having been summoned before the commissioners, and his weir decided to be illegal, he appealed, on which a case was stated by the commissioners, and a person who had taken part against the legality of the weir in the proceedings before the commissioners, was made respondent; and on argument of the case was represented by counsel. The Court having given judgment for the appellant:—*Held*, that the Court had power to grant costs against the respondent, under 20 & 21 Vict. c. 43, s. 6, although he was not strictly a complainant or prosecutor, the proceedings being initiated by the commissioners themselves.

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SALVAGE—*County Court Judge—Jurisdiction in Salvage cases—Merchant Shipping Acts* (17 & 18 *Vict. c.* 104), *ss.* 458, 460; (25 & 26 *Vict. c.* 63), *s.* 49.] By 17 & 18 Vict. c. 104, s. 458, whenever a ship is in distress, and salvage services are rendered by any person, there shall be payable by the owners of the ship, &c., to such person "a reasonable amount of salvage;" and by s. 460, when any dispute arises between the owner and salvor as to the amount of salvage, and the sum claimed does not exceed 200*l.*, the dispute shall be referred to two justices. By 25 & 26 Vict. c. 63, s. 49, the jurisdiction is extended to cases where the value of the property saved does not exceed 1000*l.*, and the same jurisdiction is given to a county court judge. By County Court Rule 276, in proceedings under 25 & 26 Vict. c. 63, a plaint shall be entered, and a summons shall be issued thereon. A plaint and summons were issued in a county court by the plaintiffs against the defendant, to answer the plaintiffs to a claim, the particulars of which were annexed; the particulars being, "the plaintiffs claim 250*l.*, amount agreed to be paid by the defendant to them for getting the defendants' schooner off the shore, and taking the schooner and cargo into a place of safety, the whole value of the schooner, cargo, &c., not exceeding 1000*l.*" The defendant sought to prohibit the county court judge from proceeding with the plaint, on the ground that he had no jurisdiction, as it was not a salvage claim, but an action of debt for an agreed sum above 50*l.*, and also on the ground that the proceeding ought not to have been by plaint in the county court, the jurisdiction being given to the judge, and not to the court. It was not denied that the value of the property saved was under 1000*l.*, nor that there had been salvage services:—*Held*, that the fact of there having been a sum agreed did not oust the jurisdiction of the county court judge, and that the proceedings were proper in form.

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SHERIFF—*Arrest on Mesne Process—Mistaken Identity—Payment of Money in lieu of Bail*—43 *Geo.* 3, *c.* 46, *s.* 2.] The plaintiff having been arrested by a sheriff's officer under a capias to hold to bail against another person, protested that he was not the right person; but in order to obtain his release he paid the sum endorsed, &c., and the officer released him, under the 43 Geo. 3, c. 46, s. 2. The money having been paid into court by the sheriff, the usual summons was taken out and served on the plaintiff; but he did not appear, and the money was paid to the person at whose suit the plaintiff had been arrested:—*Held*, that the plaintiff was not precluded from recovering the money from the sheriff.
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SLANDER—*Plea of Justification—Innuendo—Common Law Procedure Act*, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 61.] Declaration, that the defendant had spoken of the plaintiff, who was chairman of the South-Eastern Railway Company, and concerning a fall in the shares of the company, the words following: "You have heard what has caused the fall—I mean, the rumour about the South-Eastern chairman having failed?"

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meaning thereby that the defendant, being chairman of the South-Eastern Railway Company, had become embarrassed in his pecuniary affairs, and had become and was insolvent. Plea, that the defendant meant, and was understood by the bystanders to mean, that there had been and there was a rumour current on the Stock Exchange about the chairman of the South-Eastern Railway Company having failed, and not that the plaintiff had become embarrassed, and had become insolvent, as in the innuendo alleged; and that it was true that there had been and then was a rumour current on the Stock Exchange that the chairman of the South-Eastern Railway Company had failed:—*Held*, that the plea was no answer to the declaration, for that the existence of the rumour did not justify the repetition of the slander contained in it, without shewing that the defendant believed it to be true, and that he spoke the words on a justifiable occasion. *Held*, also, that if the latter part of the plea were rejected, the plea could not be supported as amounting to the general issue, for that by the Common Law Procedure Act, 1852, s. 61, the plaintiff would succeed, if the words uttered by the defendant turned out actionable, although not used in the sense put upon them by the innuendo.
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SPECIAL CONSTABLE—*Order for Expenses—Jurisdiction of Justices of Petty Sessional Division—1 & 2 Wm. 4, c. 41, ss. 1 & 13.*] By 1 & 2 Wm. 4, c. 41, s. 1, if it shall be made to appear to two justices of any county, riding, or division having a separate commission of the peace, that a tumult or riot is apprehended within any parish or place within the division or limits for which the justices usually act, they are empowered to appoint special constables. By s. 13, the justices acting for the division or limits within which the special constables have been called out, at a special session to be held for the purpose, are empowered to order the payment of the expenses of such constables, the order to be made on the treasurer of the county of which they are justices. Constables having been appointed and called out for the parish of M., within the M. petty sessional division of a county:—*Held*, that an order for the expenses was rightly made at a special sessions of the justices usually acting in the petty sessional division, and need not be made at a special session of the whole body of justices for the county.
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TOLL—*Market Toll—Reasonable Toll—Rankness—Prescription—Legal Origin.*] In 1220, the manor of Cheltenham, with a market and fair, was granted by Henry III. to the inhabitants for four years. Charles I. granted the manor in fee to persons through whom the plaintiff claimed, with all and singular the tolls due by reason of markets, &c., within the lordship. From time immemorial until 1786, there was a market-house in the High Street of Cheltenham belonging to the lord of the manor, and 1*d.* per basket for butter sold there, and 1*d.* per pot for butchers' meat hawked about the town was paid, and from 1*s.* 6*d.* to 2*s.* 6*d.* per day was paid to the occupiers of houses for stalls erected before the houses, and 1*d.* to the lord. From 1786 down to the present time, different local acts have been passed under which a new market-house has been erected; but in all the acts the rights of the lords of the manor were strictly preserved. As long as living wit-

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nesses can remember, a board has been fixed in the market with the market tolls, and the "tolls payable by all persons hawking about the town fish, fruit, vegetables, or other articles for which no toll has been taken in the market," inter alia, 1s. for every waggon, cart, horse, or ass load. These tolls were proved to have been collected regularly, as of right, since 1810 till 1863, when the defendant refused to pay the plaintiff, the present lessee of the tolls, the toll of 1s. for a cartload of vegetables and fruit brought into and hawked about the town. On a case in which the Court were to draw inferences of fact:—*Held*, that on the facts it ought to be presumed that the toll of 1s. had been taken from time immemorial, and that, if the doctrine of rankness applied, the other facts went to show that 1s. for a cartload of vegetables was not unreasonable in the time of Richard I.: *Held* also, that the claim might be sustained as a claim to a reasonable toll, which might vary in amount with the value of money: *Held* also, that a lawful origin of the toll might be presumed within legal memory, by means of a dedication of the streets to the public and a contemporaneous reservation of this toll on the part of the Crown, between the time of Henry III. and Charles I.

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TURNPIKE—*Exemption from Toll of Clergyman visiting a sick Parishioner, under* 3 *Geo.* 4, *c.* 126, *s.* 32.] A clergyman bonâ fide going to visit a sick parishioner is not, by reason of his having other persons in the carriage with him, disentitled to the exemption from turnpike toll given by 3 Geo. 4, c. 126, s. 32.

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2. ————, *Exemption from Toll of Clergyman going on Parochial Duty*—3 *Geo.* 4, *c.* 126, *s.* 32.] A clergyman of the Church of England, a curate of parish A., while officiating temporarily in a neighbouring parish B., without the permission or licence of the bishop, during the absence of the rector of the latter parish, is not, when riding to perform clerical duty in parish B., entitled to exemption from turnpike toll under 3 Geo. 4, c. 126, s. 32, which exempts from toll "any curate going to or returning from visiting any sick parishioner or on other his parochial duty within his parish."

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TURNPIKE ACT (3 Geo. 4, c. 126), s. 113—*Construction—Turnpike Road—Ditches, cleansing and keeping open.*] Section 113 of the 3 Geo. 4, c. 126, enacts, "that ditches, &c., of a sufficient depth and breadth for the keeping of turnpike roads dry, and carrying off the water from the same, shall be made, scoured, cleansed, and kept open, and sufficient trunks, tunnels, &c., shall be made and laid where carriage ways or foot ways lead out of the said turnpike roads into the lands or grounds adjoining thereto, by the occupiers of such lands or grounds," and imposes a penalty in default. The trustees of a turnpike road, under a private act of parliament, made a road with ditches on either side through the appellant's land; on one side of the road was a bank, portions of which slipped down and filled up the ditch on that side, so that water which came from the appellant's land could not be carried off:—*Held*, that the appellant could not be convicted under the above section for not cleansing and keeping open the ditch, as the words "occupiers of the adjoining lands" applied only to the latter part of the section.

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See Poor-rate. 5.

WEIGHTS AND MEASURES—5 & 6 *Wm.* 4, *c.* 63, *s.* 28—*Scales Unjust, if adjusted by Moveable Ball.*] The appellant was charged, before justices, with having a pair of unjust scales in his shop, under 5 & 6 Wm. 4, c. 63, s. 28, which inflicts a penalty on "any person who shall have in his possession a steelyard or other weighing machine which shall on examination be found incorrect or otherwise unjust." The scales were correct as to balance in the state in which they were found by the inspector; but there was hanging upon the weight end

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of the beam a hollow brass ball, which could be unscrewed at the neck and contained shot; the ball was hung by a hook upon the beam, and was easily removed by merely lifting it off. If the ball were removed, or any of the shot taken out, the scales were unjust and against the purchaser. The justices were of opinion that the ball was not part of the scales, as it was merely kept in its place by its own weight, and could be detached in an instant; and that as the shot could be removed from the ball and replaced at pleasure, it was not a proper instrument of adjustment; and they convicted the appellant:—*Held*, that the justices were justified in drawing the above inferences of fact and that the conviction was right.

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WILL—*Devise, Construction of—Implication of Cross-remainders.*] A testatrix devised one moiety of certain freehold property unto and between William, Thomas, and David P., in equal shares, and the heirs of their bodies respectively lawfully begotten, and in default of such issue of any of them, unto M. P., her heirs and assigns, for ever:—*Held*, that cross-remainders were created by implication between William, Thomas, and David P., and that the words "of any of them" must be construed in the sense "of all of them."

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